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# UNITED STATES REPORTS

## VOLUME 213

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1908

CHARLES HENRY BUTLER

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1909

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# JUSTICES

OF THE

# SUPREME COURT[1]

DURING THE TIME OF THESE REPORTS.

---

MELVILLE WESTON FULLER, Chief Justice.
JOHN MARSHALL HARLAN, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIAM HENRY MOODY, Associate Justice.

---

CHARLES J. BONAPARTE,[2] Attorney General.
GEORGE WOODWARD WICKERSHAM,[3] Attorney General.
HENRY MARTYN HOYT,[2] Solicitor General.
LLOYD WHEATON BOWERS,[4] Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[1] For allotment of the Chief Justice and Associate Justices among the several circuits see next page.
[2] Resigned in March, 1909.
[3] Of New York; appointed March 5, 1909.
[4] Of Illinois; appointed April 1, 1909.

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# SUPREME COURT OF THE UNITED STATES.

## ALLOTMENT OF JUSTICES, DECEMBER 24, 1906.[1]

ORDER: There having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, William H. Moody, Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, William R. Day, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

[1] For the last preceding allotment see 202 U. S. vii.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

## OCTOBER TERM, 1908.

## ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY *v.* CALHOUN.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 71. Argued January 12, 13, 1909.—Decided February 23, 1909.

Although defendant may have been originally in fault, an entirely independent and unrelated cause subsequently intervening, and of itself sufficient to have caused the mischief, may properly be regarded as the proximate cause of plaintiff's injuries. *Insurance Co.* v. *Tweed*, 7 Wall. 44.

An unsuccessful attempt to replace a child on a railroad car *held*, in this case, to be the proximate cause of injury to the child notwithstanding such attempt was made as the result of the child's mother having been prevented from getting off the car by the negligence of the railway employés.

Failure to foresee and provide against extraordinary and unreasonable risks taken by other persons cannot be regarded as negligence, and so *held* that a railroad company was not liable for negligence to one who, in a reckless effort to run after and board a rapidly moving train, stumbled on a truck which had been left by an employé at a place where ordinarily no passengers got on or off the cars.

18 Oklahoma, 75, reversed.

THE facts are stated in the opinion.



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*Mr. Robert Dunlap*, with whom *Mr. Henry E. Asp*, *Mr. Charles H. Woods* and *Mr. George M. Green* were on the brief, for plaintiff in error:

For the plaintiff to recover, the negligence of the railway company must have been the direct and proximate cause of the injury. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences without the intervention of an independent, unforeseen cause, without which the injury would not have occurred.

If subsequent to the original wrongful or negligent act, a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote. 1 Thompson on Negligence, § 55; *Galveston &c. Ry. Co.* v. *Chambers*, 11 S. W. Rep. 279; *Glassey* v. *Worcester Consolidated Street Ry. Co.*, 70 N. E. Rep. 199; *Herr et ux.* v. *City of Lebanon*, 24 Atl. Rep. 207; *Shaeffer* v. *Township of Jackson*, 24 Atl. Rep. 629; *Texas & P. Ry. Co.* v. *Beckwith*, 32 S. W. Rep. 347; *Cleghorn* v. *Thompson*, 64 Pac. Rep. 605; *Mo. Pac. Ry. Co.* v. *Columbia*, 69 Pac. Rep. 338; *Frassi* v. *McDonald*, 55 Pac. Rep. 139; *Lewis* v. *Flint & P. M. Ry. Co.*, 19 N. W. Rep. 744; *Claypool* v. *Wigmore*, 71 N. E. Rep. 509; *B. & O. R. R. Co.* v. *Trainor*, 33 Maryland, 542; *Hoag & Alger* v. *L. S. & M. S. R. Co.*, 85 Pa. St. 293; *Cuff* v. *N. & N. Y. R. Co.*, 35 N. J. L. 18; *N. Y., C. & St. L. Ry. Co.* v. *Perriguey*, 138 Indiana, 414; *Alexander* v. *Newcastle*, 115 Indiana, 51; *McGahan* v. *Indianapolis Natural Gas Co.*, 37 N. E. Rep. 601.

*Mr. Selwyn Douglas* and *Mr. Henry H. Howard*, for defendant in error, submitted:

A railroad company must give a passenger a reasonable time to alight at the end of his journey. *Railroad Co.* v. *Mullen*, 75 N. E. Rep. 474; *S. C.*, 217 Illinois, 203. It is pleaded, established by the evidence and found by the jury that the plaintiff in error was negligent in this respect.

It is the duty of a railroad company to furnish passengers a safe place to alight. *Harris* v. *Railway Co.*, 70 N. E. Rep. 407.

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This duty is one of law, and does not necessarily depend upon the rules of the company, but upon the circumstances, and the character and extent of the business done at the place. *Railway Co.* v. *Hyde*, 101 Fed. Rep. 401; *Railway Co.* v. *Marshall*, 81 Pac. Rep. 169.

The injury occurred in a city of the first class under the laws of Oklahoma; plaintiff in error recognized the necessity for lighting the premises, and had lights there for the purpose, which were not on this occasion burning. The dark and dangerous character of the premises is pleaded, established by the evidence and found by the jury.

The relation of carrier and passenger does not terminate when he alights upon the platform, but continues until he has had a reasonable time, under the circumstances of the case, to leave the station. *Railway Co.* v. *Wood*, 104 Fed. Rep. 663.

Defendant in error did not have a reasonable time within which to leave the premises. The peril of his position would have been increased had he attempted to do so, and an effort on his part could not have been an intelligent one. He was, consequently, as much a passenger as before he left the car, and the same duty was due him. That a child and parent will become separated in the confusion of travel, or through the negligence of the servants of the carrier, is one of the most natural and probable incidents of the business, and not only ought to be but is at all times foreseen. And that when they are separated, particularly under dangerous circumstances, or such as will distress the parent, the first humane person discovering the fact will undertake to bring them together again, is equally natural, probable and easily foreseen.

Cases cited by plaintiff in error can be distinguished from the case at bar.

MR. JUSTICE MOODY delivered the opinion of the court.

The defendant in error, hereafter called the plaintiff, brought an action in a District Court of the Territory of Oklahoma

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against the plaintiff in error, hereafter called the defendant, to recover damages suffered by him on account of an injury alleged to have resulted from the negligence of the defendant. He had judgment, which was affirmed by the Supreme Court of the Territory, and the case is now here upon a writ of error directed to that court. The trial was by a jury, and as one question of law before us is whether a verdict for the plaintiff was warranted, the evidence is reported in full. In returning a general verdict for the plaintiff the jury also made special findings in response to 57 questions submitted to it in accordance with the practice permitted in the Territory. The only question of law which it is deemed necessary to determine is, whether all the evidence, with the inferences which might properly be drawn from it, sustained the verdict for the plaintiff, upon the issue submitted to the jury. Instead of setting forth fully the material parts of the evidence it seems better, with the aid of the special findings, to state the facts which it tended to prove. It hardly need be said that wherever there is a fair doubt, that aspect of the evidence most favorable to the plaintiff has been accepted.

Mrs. Calhoun and her son, the plaintiff, a boy a little less than three years of age, were passengers upon a southbound train of the defendant railroad. Their destination was Edmond in the Territory of Oklahoma. The train, somewhat late, arrived at Edmond about 11.30 o'clock in the evening. Mrs. Calhoun had never traveled over the route before, the station was not called out by any of the trainmen, nor was she told by any of them that it was Edmond. In answer to a question she was informed by other passengers that the train had arrived at Edmond, and she hastened to alight, leading the boy with her. When she reached the platform of the car the train had started up again, after, as the jury found, a stop of one minute, and she handed the boy to Mr. Robertson, another passenger on the train, who had left it momentarily, intending to return and resume his journey. Mr. Robertson was then standing upon the station platform. He took the child, handed him to his

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son, whom he had met at the station, returned to the steps of the car, and told Mrs. Calhoun not to jump off, as the car was running too rapidly. The station platform was dimly lighted, and no employé of the defendant rendered Mrs. Calhoun or her boy any assistance in leaving the train, nor gave them any warning.

The plaintiff was landed without injury on the station platform and put in the charge of Mr. Robertson's son by his father, who said: "Keep the child and the train will stop and let the lady off." Just then a young man or boy by the name of Carl Jones, supposed by Mr. Robertson's son to be a railroad official, though he was not, took up the child in his arms, ran along by the car, which was moving all the time with increasing rapidity, and attempted, without success, to return the child to its mother, who was standing on the platform of the car. Jones ran 75 to 100 feet to the end of the wooden station platform and then stumbled over a baggage truck, which had been used in unloading the baggage from the train, and had been left at the very end of the platform and partly on it, within a few feet of the rails. When Jones stumbled he lost his hold of the child, who fell under the car and was injured. The train consisted of the engine, followed by a mail car, baggage car, express car, smoking car, day coach, in which the plaintiff had been travelling, chair car, and a sleeper, in the order named. The baggage car, therefore, was some distance ahead of any passenger car, and the truck was used at the baggage car and left at or near the point where it had been used. Mrs. Calhoun started to leave the car at its south end, nearest the baggage car, and there was, therefore, between that point and the north end of the baggage car the length of the express and smoking cars. Jones was not called as a witness by either party. None of the trainmen knew that Jones was attempting to put the plaintiff back on the train until after the injury.

The jury was instructed by the presiding judge that, as the plaintiff had been safely taken from the train and committed to the care of a young man on the station platform, there could

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only be a recovery by reason of what happened after that time. But the jury was instructed that the plaintiff might recover if it found that "the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted, and that such condition directly and approximately contributed to the injury." There was another ground of recovery submitted to the jury, but it was negatived by the findings and need not be considered further.

It is clear enough, upon this statement of facts, that the railroad did not exercise proper care to afford the plaintiff and his mother a reasonable opportunity to leave the car with safety. The train was late. The attention of the trainmen was fixed upon a quick starting and diverted from the care of the passengers, and the stop at the station was very brief. Taking these circumstances into account with the failure to inform Mrs. Calhoun that she had arrived at her place of destination, there is no difficulty in concluding that the defendant was negligent. If Mrs. Calhoun and her son as they were about to step upon the station platform had been injured by the premature starting of the car, the defendant unquestionably would have been liable. But the injury did not occur in that way. Mrs. Calhoun handed the child to Mr. Robertson to take off the train, and she herself testified that "the child was safely off the train; I saw it in the arms of the gentleman."

The defendant contends that the jury was permitted to find for the plaintiff on account of the negligence which occurred prior to the time he was landed without injury, namely, the failure to announce the station, to assist the passengers, to light the platform adequately at the point of leaving the train, and the delay insufficient to allow passengers to leave the train with safety. The failure in the performance of the clear duty to afford the passengers a safe place and a reasonable time in which to alight, was not, the defendant insists, the proximate cause of the subsequent injury, which was, on the contrary, caused by the foolhardy conduct of Jones in attempting to put back the plaintiff on the train.

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Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life. In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word "cause" when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Insurance Co.* v. *Tweed*, 7 Wall. 44, 52. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man. Thus it has been held that if one unlawfully leaves upon a public street a truck loaded with iron which he ought to have foreseen would very likely be disturbed by heed-

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less children, he is responsible for an injury which occurs as the result of such disturbance. *Lane* v. *Atlantic Works*, 111 Massachusetts, 136, and see *Lynch* v. *Nurdin*, 1 Q. B. 29; *Railroad Company* v. *Stout*, 17 Wall. 657; *Union Pacific Railway Co.* v. *McDonald*, 152 U. S. 262. Without pursuing the subject further, it may be said that among the many cases in which the subject of proximate cause has been discussed are the following: *Milwaukee &c. Railway Co.* v. *Kellogg*, 94 U. S. 469, 475; *Scheffer* v. *Railroad Company*, 105 U. S. 249; *Cole* v. *German Savings & Loan Soc.*, 124 Fed. Rep. 113; *Stone* v. *Boston & Albany Railroad*, 171 Massachusetts, 536.

It is not necessary for us to consider whether the original neglect of the defendant could properly have been found by the jury to have been the cause of the plaintiff's injury, and we express no opinion upon that question. The defendant's contention that the jury was permitted to find a verdict on that ground cannot be sustained. The charge to the jury makes this clear. The presiding judge said:

"It is admitted that the plaintiff was safely taken from the train in question and committed to the care of a young man on the depot platform, therefore, even though you find that the station at Edmond was not called that fact can only be considered by you for the purpose of explaining the respective positions of mother and child at that time, and if the plaintiff recover it must be by reason of events and conditions subsequent to the time he was taken from the train."

The defendant, it is true, claims that it suffered harm, because the conflicting evidence with regard to the original negligence was submitted to the jury and tended to divert their minds from the real issue. But we think the judge did about as well as he could to make the issue plain to the jury, in view of the fact that he was tied down to written instructions, and thereby prevented from giving the jury the aid that is demanded from the bench for the most successful working of the jury system.

Leaving entirely out of view, then, the original carelessness of

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the defendant, we come to the real issue, which was submitted to the jury, upon which alone its verdict can stand. Was the company guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and did that condition directly and proximately cause the injury?

It cannot be doubted that the conduct of Jones was careless in the extreme, though doubtless the motives which impelled him were good. But it is urged that Jones' negligence concurred with the negligence of the defendant in leaving the truck where it did, and that therefore both are responsible for the consequences. There is no doubt that the act of Jones and the act of the defendant with respect to the truck concurred in causing the injury, and we assume that if the defendant failed in its duty by leaving the truck at the end of the wooden platform the verdict can be sustained. *Washington & Georgetown Railroad* v. *Hickey*, 166 U. S. 521. It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that "if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts, 8th ed., 41.

In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. On the other hand, if it

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had been left a mile from the station, where by no reasonable hypothesis passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be

*Reversed.*

## DAVIDSON BROS. MARBLE COMPANY *v.* UNITED STATES ON THE RELATION OF GIBSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 78. Argued January 15, 1909.—Decided February 23, 1909.

*U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, followed to effect that the act of February 24, 1905, c. 778, 33 Stat. 811, amending the act of August 13, 1894, c. 280, 28 Stat. 278, is prospective and does not control actions based on rights of material-men already accrued, but that such actions are controlled by the act of 1894.

As the act of August 13, 1894, c. 280, 28 Stat. 278, does not specify in which Federal court the action of a material-man claiming rights

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thereunder must be brought, the question of jurisdiction is settled by the general statutory provisions relating thereto; and, under the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, a suit cannot be maintained in a district where the defendants do not reside.

The jurisdiction of the Circuit Court is fixed by statute, and a rule of court inconsistent with the statute is invalid.

A defendant, having a statutory right to appear specially and object to the jurisdiction and the right to appeal to this court if the objection be overruled, cannot be compelled by a rule of court to waive the objection and appear generally; and Rule 22 of the Circuit Court of the United States for the Ninth Circuit requiring a general appearance if the Circuit Court overrule such objection is inconsistent with § 918, Rev. Stat., and therefore invalid.

THIS case comes here from the Circuit Court of the United States for the Northern District of California, on the single question of the jurisdiction of that court.

The United States, on the relation of Murray Gibson, on November 20, 1906, brought this action against Davidson Bros. Marble Company, a corporation organized under the laws of the State of Illinois, and therefore, for jurisdictional purposes, a citizen of that State, and Samuel A. Tolman and John A. Tolman, citizens and residents of that State. Neither of the defendants was alleged to be an inhabitant of the district. The complaint set forth in substance the following cause of action: The Davidson Company on October 10, 1901, agreed, in writing, with the United States to construct a public building in San Francisco, in the Northern District of California. On October 18, 1901, the Davidson Company, as principal, and the two individual defendants as sureties, executed a bond running to the United States, conditioned that the Davidson Company should fulfill its contract with the United States and make payment to all persons supplying the Davidson Company with labor or materials in the prosecution of the work. Under a contract made on July 25, 1902, Gibson furnished to the Davidson Company certain labor and materials used in the prosecution of the work, for which a large sum is due and unpaid. No

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suit was brought by the United States within six months after the completion of Davidson Company's contract with the United States, and thereafter Gibson applied to the Treasury Department and furnished an affidavit that he had supplied labor and materials for which payment had not been made. Whereupon, the department furnished him with a certified copy of the contract, and subsequently this action was begun. A writ of summons was issued to the defendants and served upon them personally in Illinois. Notice of the pendency of the suit was also given by publication. On January 9, 1907, the defendants appeared specially and filed a demurrer and a motion to quash service and to dismiss, which were, respectively, as follows:

*Demurrer.*

"The defendants . . . demur to the complaint of the plaintiff herein upon the following grounds:

"First. That the court has no jurisdiction of the defendants or either of them.

"Second. That the plaintiff is not a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

"Third. That the defendants are not nor is either of them a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

"Fourth. That at the time of the commencement of this action the plaintiff, Murray Gibson, trading as John Gibson, was and now is a citizen and resident of the State of Pennsylvania, and that at the time of the commencement of this action the defendants were, and each of them was, and now is, a citizen and resident of the State of Illinois.

"Fifth. That this court has no jurisdiction of the subject of the action.

"Sixth. That this court has no jurisdiction of the controversy alleged in the complaint.

"Wherefore the defendants pray to be hence dismissed with their cost."

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*Motion to quash.*

"The defendants above named and each of them hereby appear specially in the above-entitled cause for the purpose only of moving the said court to quash and set aside the service of the summons in the said cause and to dismiss the said action upon the ground that the said court has no jurisdiction of the persons of the defendants, and upon the further ground that the said court has no jurisdiction of the person of the plaintiff, and upon the further ground that neither the plaintiff nor the defendants or any or either of them are citizens of the State of California or residents of the Northern District of California in the Ninth Judicial Circuit, and upon the further ground that the said court has no jurisdiction of the controversy at issue. The said motion will be based upon the complaint of the plaintiff, and all subsequent proceedings and the return of service of said summons herein."

The motion to quash was denied and the demurrer was overruled. The defendants declined to plead further, a judgment was entered against them for the amount claimed in the complaint, and thereupon the defendants by writ of error brought the question of jurisdiction directly to this court.

The law in force at the time the contract with the United States, the bond given to the United States and the contract with Gibson were made, is the act of August 13, 1894, 28 Stat. 278, c. 280, which is as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department un-

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der the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense.

"SEC. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

*Mr. Edwin M. Ashcraft* for plaintiffs in error:

The United States is the real plaintiff and not a nominal party. The act of February 24, 1905, is not retroactive and the act of August 13, 1894, governs in this case. *United States Fidelity Co.* v. *United States*, 209 U. S. 306.

This action should have been properly brought in the Northern District of Illinois, the district of which plaintiffs in error are inhabitants. Section 1, act March 1, 1887, 24 Stat. 373; *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41; *Re Keasbey & Mattison Co.*, 160 U. S. 221; *Re Wisner*, 203 U. S. 449.

Plaintiffs in error have not voluntarily submitted to the jurisdiction of the court or waived their privilege of being sued in the district of which they are inhabitants. *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368; *St. Louis & San Francisco R. R. Co.* v. *McBride*, 141 U. S. 127; *Harkness* v. *Hyde*, 98 U. S. 476–479; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

The Circuit Court of the Northern District of California has misconstrued rule 22 of its rules of court and if it has not, said rule 22 is unreasonable and invalid. Rule 93, 3 Rose's Code of

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Fed. Procedure, p. 2293; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

*Mr. Robert T. Devlin* and *Mr. Henry P. Brown*, for defendant in error, submitted:

Under rule 22 of the Circuit Court of the United States in which this action was commenced and prosecuted, the special appearance entered by the defendants was converted, by their failure to file the stipulation required, into a general appearance, and they have therefore waived any defect in the jurisdiction. See *Mahr* v. *Union Pac. R. R. Co.*, 140 Fed. Rep. 921.

The statute herein in question declares that the suit must be brought in the Northern District of California. It can, under the statute, be brought nowhere else. Hence, by the very language of the statute, the Circuit Court of the Northern District of California, and no other court, has jurisdiction. Stats. at Large, 1905, 811, 812; *American Surety Co.* v. *Lawrenceville Cement Co.*, 96 Fed. Rep. 25, 26.

The Circuit Court for the Northern District of California has exclusive jurisdiction of this action, and the defendants may be served wherever found, or it may be that no personal service is requisite.

Construction of statutes should be sensible; general terms should be so limited as not to lead to injustice, oppression or absurd consequences. It will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. *United States* v. *Kirby*, 7 Wall. 486; *In re Chapman*, 166 U. S. 667; *Low Ow Bow* v. *United States*, 144 U. S. 59; *Railroad* v. *Husen*, 95 U. S. 472. In case of doubt, a literal construction leading to an absurdity must be rejected in favor of a more liberal, which will effectuate the object intended. *Wilson* v. *Mason*, 1 Cr. 101; *Doolittle* v. *Bryan*, 14 How. 567; *Kennedy* v. *Gibson*, 8 Wall. 506. Statutes should be construed so as to relieve the State from imputation of

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bad faith. *Red Rock* v. *Henry*, 106 U. S. 604; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 38.

Where a particular construction of a statute will work injustice or occasion great inconvenience, it is to be avoided in favor of another and more reasonable construction if possible. *Knowlton* v. *Moore*, 178 U. S. 77.

Statutes should be construed with a view to the original intent and meaning of the makers; and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances, and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute. *Thompson* v. *State*, 20 Alabama, 54; *Chesapeake & O. Canal Co.* v. *Baltimore & O. R. Co.*, 4 Gill & J. 1; *Baring* v. *Erdman*, Fed. Cas. No. 981.

In interpreting statutes it is the duty of the courts at all times to make such construction as shall suppress the mischief and advance the remedy. *Parkinson* v. *State*, 14 Maryland, 184.

MR. JUSTICE MOODY, after making the foregoing statement, delivered the opinion of the court.

The decision of the court below proceeded upon the erroneous assumption that the act of February 24, 1905, 33 Stat. 811, c. 778, was retrospective. That act amended the act of 1894 in several important particulars, which it is not necessary to state, and provided specifically that a suit upon the bond should be brought by one furnishing labor and materials, in the name of the United States, in the Circuit Court of the United States in the district where the contract with the United States was to be performed, and not elsewhere. As this suit was brought after the passage of the amending act, it was brought in the only district where it could be maintained, if the amending act were retrospective. But it is not retrospective. *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306. In this case the con-

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tract with and the bond to the United States, and the contract under which Gibson furnished labor and materials, all antedate the passage of the amending act, and the rights of the parties, therefore, must be determined under the act of 1894. An act passed on the same day, August 13, 1894, 28 Stat. 279, c. 280, authorized incorporated surety companies to become sureties on bonds running to the United States, and the fifth section fixed the district in which a suit upon the bond against the surety company should be brought. But nothing was said as to the district where the sureties were individuals, as was the case here. While the act of 1894 authorized a person supplying labor and materials to bring suit upon the bond in the name of the United States against the contractor and sureties, it did not specify the court in which the suit should be brought, and the omission was not supplied until the enactment of the law of 1905, which, as has been pointed out, is not applicable to this case. The jurisdiction, therefore, of the courts of the United States must be sought in the general provisions of the statutes relating to that subject. It has been decided that under this statute, for jurisdictional purposes, the United States is the real party plaintiff. *U. S. Fidelity Co.* v. *Kenyon*, 204 U. S. 349. We have here, then, a suit in which the United States is plaintiff and three citizens and residents of the State of Illinois are defendants. Obviously, this suit is not a controversy between citizens of different States, and the rules governing where such diversity of citizenship exists have no application. The case is governed by that part of the act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, which provides that no civil suit shall be brought before any of the Circuit Courts of the United States "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." *McCormick* v. *Walthers*, 134 U. S. 41; *In re Keasbey & Mattison Co., Petitioner*, 160 U. S. 221; *United States* v. *Southern Pacific R. Co.*, 49 Fed. Rep. 297, opinion by Mr. Justice Harlan. It follows, therefore, that the court below was without jurisdiction of this cause, and, as the



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defendants have taken no action whatever in response to the summons, except to appear specially and object to the jurisdiction, it cannot possibly be said that the objection to the jurisdiction has been waived.

The learned Judge of the Circuit Court, however, based his decision upon rule 22 of the Circuit Court of the United States for the Ninth Judicial Circuit, which is as follows:

"Any party may, without leave of court, appear specially in any action at law or suit in equity for any purpose for which leave to appear could be granted by the court, by stating in the paper which he serves and files that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

The defendants appeared specially and objected to the jurisdiction, but did not state in the appearance that "if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court," they "will appear generally in the case." Therefore, if the rule is held to be valid, such an appearance must be deemed a general appearance. And so it was decided in the court below.

The rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid. Rev. Stat., § 918. A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and, the decision being against his objection, may of right bring the question directly to this court. The rule substantially impairs his right to appeal to this court, a right which is conferred by statute. 26 Stat. 826, c. 517, March 3, 1891. It says to him, you may appear specially and object to the jurisdiction, only upon the condition that you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general

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appearance; if you do not agree to do this, your special appearance will be deemed to be general. We think it was beyond the power of the Circuit Court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself. The jurisdiction of the Circuit Courts is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid. So it has been held that, under the act which requires the practice in the courts of the United States to conform as near as may be to the practice of the courts of the States in which they are held, state statutes which give a special appearance to challenge the jurisdiction, the force and effect of a general appearance must not be followed by the courts of the United States. *Southern Pacific Company* v. *Denton*, 146 U. S. 202; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496. The reasoning in these cases is pertinent to the case at bar.

To sum up, the Circuit Court for the Northern District of California had no jurisdiction to entertain this suit against these defendants, who are not inhabitants of that district, but, on the contrary, inhabitants of the State of Illinois. The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction. They were not bound to agree to submit their objection to the final decision of the judge of the Circuit Court, and the rule of court which treated the special appearance, without such an agreement, as a general appearance, was invalid.

For these reasons the judgment is reversed and the case remanded to the Circuit Court, with instructions to dismiss the action for want of jurisdiction, and

*It is so ordered.*

MR. JUSTICE MCKENNA dissents.

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# MARTINEZ *v.* LA ASOCIACION DE SENORAS DAMAS DEL SANTO ASILO DE PONCE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 83. Argued January 21, 1909.—Decided February 23, 1909.

All relations between Spain and Porto Rico having been severed by the cession of that Territory by the Treaty of Paris, a corporation organized under the laws of Spain for purely local and charitable purposes in Porto Rico is not to be regarded as a citizen of Spain within the meaning of the provisions of the act of April 12, 1900, c. 191, 31 Stat. 77, as amended by the act of March 2, 1901, c. 812, 31 Stat. 953, relating to the jurisdiction of the District Court of the United States for Porto Rico, nor is such a corporation a citizen of the United States within the meaning of such provision; if it is a citizen of any country it is a citizen of Porto Rico.

The people of Porto Rico have been created by Congress and exist as a body politic subject only to the usual reserved power of annulment of territorial legislation; and the government of Porto Rico under the organic act is charged with the creation and control of corporations strictly local in character, and corporations of that nature organized prior to the cession of the island are to be regarded for jurisdictional purposes as citizens of Porto Rico.

While by Article IX of the Treaty of Paris between Spain and the United States provision is made for Spanish subjects, natives of the peninsula, to preserve their allegiance to Spain, that article has no reference to corporations; nor is there any other provision of the treaty providing therefor. *Quære* and not decided, what the citizenship now is of Spanish corporations doing business in Porto Rico prior to its cession by the Treaty of Paris to the United States.

THE facts are stated in the opinion.

*Mr. Fritz von Briesen,* with whom *Mr. Charles M. Boerman* was on the brief, for appellants.

*Mr. John W. Yerkes,* with whom *Mr. George E. Hamilton,*

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*Mr. M. J. Colbert* and *Mr. John J. Hamilton* were on the brief, for appellee.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellee, alleging itself to be "a charitable corporation, organized and existing under the laws of the Kingdom of Spain," brought a bill in equity in the District Court of the United States for Porto Rico against the appellants, alleging them to be citizens of Porto Rico. The object of the suit, generally described, is to assert title to certain lands in Porto Rico, and its determination turns upon the construction of the will of Juan Bautisti Silva, an inhabitant of Porto Rico, who died in 1875. The suit, therefore, does not arise under the Constitution, laws or a treaty of the United States. A decree was entered in favor of the plaintiff, and the defendants appealed to this court.

Before entering upon a consideration of the merits of the cause the jurisdiction of the court below to entertain it, which is questioned, must be passed upon. The District Court of the United States for Porto Rico was created, and its jurisdiction defined, by the act of April 12, 1900, establishing a civil government for Porto Rico, 31 Stat. 77, chapter 191, as amended by the act of March 2, 1901, 31 Stat. 953, chapter 812. By § 34 of the first act it was provided that—

"Porto Rico shall constitute a judicial district to be called the District of Porto Rico, . . . the District Court for said district shall be called the District Court of the United States for Porto Rico . . . and shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court."

The jurisdiction was further defined in § 3 of the last act, which provided that "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition

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to that conferred by the act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

If the court below had jurisdiction, it must be under the amending act and because the plaintiff was either a citizen of the United States or a citizen or subject of a foreign state. No other ground of jurisdiction has been or can be suggested. It was found by the District Court that the plaintiff was a citizen or subject of Spain and the jurisdiction was sustained upon that theory. Counsel in this court have attempted to sustain the jurisdiction on the ground that the plaintiff, if not a citizen or subject of Spain, is a citizen of the United States. If the plaintiff was neither a citizen of the United States, nor a citizen or subject of Spain, it is clear that the court was without jurisdiction.

We assume, in favor of the plaintiff, that it was a corporation organized in 1863 by a decree of the Spanish Crown. That decree incorporated an asylum of charity in Ponce. The purposes of the incorporation are described in article 1 of the by-laws, which follows;

"This association recognizes as its principal object the alleviation of human suffering, and for this purpose it will establish an asylum for the poor of the district. When its resources permit it to give its attention to other objects related to its purpose it will establish schools for poor children of both sexes, under the supervision of Sisters of Charity."

The incorporators were all residents of Ponce, and all the purposes of the corporation were to be accomplished and all its business done in that locality.

The first question is, whether, after the ratification of the treaty of peace between the United States and Spain, the plaintiff corporation continued to be a citizen or subject of Spain.

It is assumed, in passing upon this question, that Congress

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in employing the word citizen in this connection intended to include corporations, in view of the decisions of this court that the word has that meaning when used in the definition of the jurisdiction of the Circuit Courts of the United States. *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545.

By the treaty of peace (30 Stat. 1754), Spain ceded Porto Rico to the United States and thereby parted with all sovereignty over that island. Careful provision was made that the cession should not impair the property or rights of corporations, associations or individuals. Article VIII. It is clear, however, that thereafter the duty to protect property and rights within the ceded territory rested upon the United States. An opportunity was afforded to Spanish subjects, natives of the peninsula, to preserve their allegiance to the crown of Spain by making within a limited time a declaration to that effect. Article IX. This article obviously had no reference to corporations. No other provisions of the treaty seem relevant to the question before us.

We are of opinion that the cession of Porto Rico by Spain to the United States severed all relations between Spain and this corporation, and that thereafter it cannot be regarded in any sense as a citizen or subject of Spain. Spain has no duty to or power over it. We confine this statement to a corporation like the one before us, formed for charitable purposes and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration, as, for instance, if it were a Spanish trading corporation, with a place of business in Spain but doing business by comity in the island of Porto Rico.

The next question is whether the plaintiff corporation is a citizen of the United States. Its status during the period between the cession and the passage of the act to provide a civil government for the island need not be determined. That act created a form of government for Porto Rico and its adjacent islands, in which there was exhibited, with some modifications,

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the characteristic American separation of the legislative, executive and judicial powers. The United States has never granted to any territory organized by act of Congress complete self-government, and Porto Rico is no exception to the rule. Indeed, though the act confers a considerable measure of self-government, for reasons deemed sufficient by Congress, it stops short of the power usually conferred upon territories within the continent. This organic act has the provision common to most, if not all, our territories, whether fully incorporated into the United States or not, that Congress may, if it deem advisable, annul all laws enacted by the local legislative assembly. Subject to these limitations, a body politic, under the name of The People of Porto Rico, with a citizenship of its own, is created (§ 7); existing laws, not in conflict with the applicable laws of the United States, are continued in force until altered, amended or repealed by the legislative assembly or by Congress (§ 8); public property acquired by the United States from Spain is placed under the control of the local government, and the legislative assembly is given power to legislate with respect to it (§ 13); the legislative authority is given "power by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, continued in force by this act" (§ 15); the Governor is enjoined faithfully to execute the laws, and given to that end the applicable powers of a Governor of a Territory of the United States (§ 17); the legislative assembly of Porto Rico is constituted (§ 27); and the scope of the legislative power is fully described in § 32, as follows:

"That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights,

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and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

In the form of government, which is typically American, the creation and control of corporations is exclusively a legislative function. We are of opinion that the effect of the organic act is to intrust that function, so far as it relates to a corporation of the kind under consideration, whose essential qualities need not be repeated, to the government of Porto Rico; and that such a corporation is now, if a citizen of any country, a citizen of Porto Rico. We need not consider whether the corporation has more than a *de facto* existence, subject to the will of the Porto Rican legislature. It follows that the court below had no jurisdiction of this cause.

*The decree is reversed and the cause remanded to the District Court of the United States for Porto Rico, with instructions to dismiss the bill, without prejudice, for want of jurisdiction.*

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## EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. BROWN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 74. Argued January 13, 14, 1909.—Decided March 1, 1909.

A life insurance company which has several hundred thousand policyholders is in its nature a public institution, and where there is no apprehension as to its solvency, a court of equity will consider all the facts as to the relative advantages and disadvantages of a receivership or accounting before granting relief of that nature in the suit of an individual policyholder even if jurisdiction to grant such relief exists.

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The fact that stockholders claim the surplus of an insurance company and the officers of the company do not actively deny the claim gives no ground for a receivership at the suit of a policyholder claiming that the surplus belongs to the policyholders.

A demurrer only admits facts well pleaded in the pleading demurred to; it does not admit the pleader's conclusions of law or the correctness of his opinions as to future results.

The construction of a general act and a charter granted thereunder pertain to the state court just as if the charter were granted by a special act; and in a suit by the holder of a policy, executed at the home office, the meaning and construction of the charter as held by the state court will be binding on the Federal courts, and, in the absence of any Federal question, the construction of the contract by the state court will be of most persuasive influence even if not of binding force.

The wrongdoing of former officers of an insurance company, and their continuance in power, in the absence of any trust relation, gives no jurisdiction for an accounting in equity in a suit in which the company is the only defendant as between a simple debtor and creditor.

The Equitable Life Assurance Society is not a trustee of its policyholders under its charter and policies as the same have been construed by the highest courts of the State of New York.

As the charter and contract have been construed by the highest court of New York, a policyholder in the Equitable Life Assurance Society can only participate in the surplus of the society according to the terms of the policy; and a discretion rests with the officers of the society as to what amount of surplus shall be retained and distributed, and when the distribution shall be made.

While wrongdoing, waste, and misapplication of funds reducing the surplus of an insurance company before distribution, might give ground of action to a policyholder, it would not necessarily, where there is no allegation of insolvency, give ground for equitable action.

Where the bill avers solvency of defendant at present, a prediction of insolvency in the future on account of inability to meet claims of policyholders by reason of mismanagement is a mere conclusion of law and not a fact which is admitted by demurrer or on which a court can grant equitable relief.

Where a suit for accounting by a policyholder against an insurance company as sole defendant avers that the stockholders claim to own the surplus, no decree can be made as to such ownership without the presence of the stockholders as parties.

Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of

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law, and where, so far as necessary, discovery may be obtained as well as in equity. Rev. Stat., § 724; *United States* v. *Bitter Root Co.*, 200 U. S. 451.

A complainant who can obtain all the relief to which he is entitled in a single suit cannot invoke the interference of a court of equity on the ground that defendant may be saved a multiplicity of suits against it by others situated similarly to himself.

151 Fed. Rep. 1, reversed.

THIS case comes here on writ of certiorari, which brings up the record from the Circuit Court of Appeals for the Second Circuit, reversing the decree of the Circuit Court for the Southern District of New York, which sustained the petitioner's demurrer to the plaintiff's bill and dismissed the same. The opinion of the Circuit Court is reported in 142 Fed. Rep. 835, and that of the Circuit Court of Appeals, 151 Fed. Rep. 1.

The bill was filed against the defendant (the petitioner above named) some time in August, 1905, and is one of extreme length, and makes allegations in great detail relating to the conduct of the business of the defendant by its board of directors and by its officers and agents for many years prior to the filing of the bill. It will not be necessary to repeat all of them in order to understand the case as made. The following facts, among many others of a similar nature, appear in the bill:

The complainant is a citizen of the State of Maryland and brings this suit in behalf of himself, as well as all the policyholders and annuitants of the company defendant, who may choose to come in and join therein; the defendant is a citizen of the State of New York and an inhabitant of the Southern District thereof.

The defendant was incorporated in May, 1859, under a general law of the State of New York, passed June 24, 1853, providing for the incorporation of life and health insurance companies. In accordance with this act there was filed by the incorporators a declaration, in the nature of a charter, from which it appears that the capital of the defendant was $100,000 in cash, divided into 1,000 shares of $100 each, and the corpo-

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rate powers of the company were vested in a board of directors. The insurance business was to be conducted upon the mutual plan. The holders of the capital stock were, by the declaration, to have the right "to receive a semi-annual dividend on the stock so held by them, not to exceed three and one-half per cent of the same; such dividends to be paid at the times and in the manner designated by said directors of the company. The earnings and receipts of said company, over and above the dividends, losses and expenses, shall be accumulated."

The officers were to strike a balance every five years from December 31, 1859, which was to exhibit its assets and liabilities and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policyholder was to be credited with an equitable share of the surplus, which was to be applied to the purchase of an additional amount of insurance for each policyholder, or, if any policyholder should so direct, such equitable share of the surplus should be applied in his case to the purchase of an annuity.

The complainant took out a policy in the company on the twenty-eighth of December, 1867, for $25,000, in the form of an ordinary life policy, which was subsequently, and on the twelfth of January, 1876, changed to another ordinary life policy, payable to his wife upon his death, and if his wife were not then living, then to the children of complainant, and if there were no children, then to the complainant's executors, administrators or assigns. The policy was also issued and accepted upon certain conditions printed on its back, which were accepted as a part of the contract, among which provisions is the following:

"6. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract, but the society may, at any time before a forfeiture, upon the request

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of the person holding the absolute legal title to this policy, substitute a cash payment, to be fixed by said society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policyholders shall so elect."

The complainant elected to receive his share of the surplus, as ascertained from time to time, in the reduction of the premium, and the company was notified of that election and ratified and accepted the same, and since the date of the issuing of the policy the complainant has regularly paid the premiums thereon as they severally accrued, after deducting the sums which at each period the officers of the defendant stated to be the entire amount applicable in reduction of the premiums as complainant's equitable share in the surplus. Although the complainant has been entitled to have his full share of the lawfully ascertained and true surplus profits of the defendant applied in reduction of his premium, yet the amounts allowed by the officers of the defendant in reduction of his premium have not been the real amounts of complainant's equitable share in the true surplus, but by means of the abuse of discretion, wrongs, and the inequitable and fraudulent conduct of the defendant, its officers and agents, the company, its officers and stockholders, have wrongfully retained and to the extent of a large sum, fraudulently wasted and misappropriated to themselves a large portion of complainant's share in said surplus; that he has accepted such reductions of premium as have been from time to time assigned to him solely because of his belief that the officers of the defendant were acting in a just and lawful manner, and in reliance upon the representations of the officers of the defendant thereto, stating that he was receiving his lawful share of the true surplus, which representations were untrue and fraudulent and without knowledge by complainant that they were untrue, or of the facts thereafter stated in the bill.

The defendant has, at the expiration of each year since the defendant's incorporation, ascertained and entered upon its books a sum alleged to be the "net surplus" earned by the

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defendant during the preceding year, which surplus has been reported annually for many years to the insurance department of the State of New York as the fund which belonged to the policyholders exclusively, and one in which the stockholders were without any interest whatever, while on the other hand the defendant now claims that such surplus belongs to its stockholders.

The defendant, through its officers, has been crediting and paying to its policyholders, from time to time, only a portion of the surplus admitted to exist by the defendant, and to the whole amount of which complainant and the other policyholders are entitled in equitable proportion, and the officers, contrary to the rights of the policyholders and in fraud of their rights, have not credited the policyholders with their equitable share of the surplus, although such surplus has been duly ascertained from their books, nor have they paid policyholders whose policies matured from time to time their just and equitable share of such surplus to which they were entitled, and the stockholders now claim and threaten to appropriate all the surplus as a dividend, or earning, upon the shares of stock of the company, in direct disregard of the representations made by the defendant to the superintendent of insurance of the State and in disregard of the rights of the policyholders.

From the books it appears that there were in 1904 over 500,000 policyholders; over $1,495,000,000 of insurance risks; over $413,000,000 of assets; liabilities over $333,000,000, and a surplus of over $80,000,000. That there are over $10,000,000 of the surplus in which the stockholders can have no interest and which are still claimed by them. The retention of the surplus has been wrongful and for the fraudulent purpose to pile up a fund under the control of the defendant and its officers, by the use of which they could secure illegal and personal gain, and out of which they could distribute large sums to and among themselves under pretense of payment of salaries and expenses, by improper and extravagant disbursements, and

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that in fact they have distributed to themselves improper and extravagant salaries, commissions and expenses from the fund or surplus which belonged to the policyholders. Great waste and extravagance are alleged to have been committed by the defendant through its officers in many ways. The officers of defendant have failed to properly invest and reinvest the funds of the company, but have willfully and negligently misappropriated and fraudulently mismanaged them.

About January, 1905, dissensions among the officers and board of directors occurred, and in consequence a committee of the defendant was appointed for the purpose of investigating its affairs and condition, and the superintendent of insurance also conducted an investigation, and the results showed the facts above stated in very great detail. A committee of the legislature also investigated the condition of the defendant during the fall of 1905 and reported to the legislature in 1906, showing the same facts.

Mr. Thomas F. Ryan in the meantime had become the owner of 502 shares of the stock of the defendant (a majority thereof), with a par value of $50,200, which were purchased by him for $2,500,000, and thereupon he executed a deed of trust to three trustees, with power to vote the stock as stated in the deed, and since that time Ryan has been the managing spirit in the defendant. Twenty directors have been elected to fill vacancies in the board of directors and are serving thereon, but the right to do so is denied by the complainant and the minority stockholders, and until such questions are settled by the determination of a court of final jurisdiction there does and will exist absolute confusion and corporate anarchy in the management of the affairs of the defendant.

If properly conducted the defendant has sufficient assets to provide for and liquidate every outstanding policy and to insure the performance of every contract made by the defendant with its annuitants. It is subsequently averred that the defendant is insolvent, because it is responsible to the policyholders for the excessive sums paid in the way of salaries and

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fees, and also for all sums of money lost consequent upon fraud and waste, and such amounts are said to be more than the defendant will have funds to meet when proved and demanded. (This, by way of opinion and prediction.)

The defendant is still in the control of the stockholders, whose representatives have been guilty of misappropriation and its business is at a standstill. The interests of the policyholders are to place the assets in the hands of a receiver, in order to wind up the affairs of the defendant, which is the only way to safeguard the policyholders' interests. An action at law is inadequate to afford proper relief and there would result, if such actions were necessary, a multiplicity of suits.

As relief, the bill prayed for the production of all books, papers and records of the defendant, and that an accounting be had of all the dealings and transactions of the defendant, its officers and agents and stockholders, from the commencement of the business of the defendant in 1859, or for such period as the court might deem proper. Also, that a trust be adjudged and declared to exist and imposed upon the assurance funds and surplus, as ascertained, as against the defendant, its officers and stockholders, and that it be adjudged that they, and each of them, hold the same as trustees for such persons as shall be declared to have interests therein under the decree to be entered in the cause. Such accounting should also be taken for the purpose of ascertaining to what extent the defendant is indebted to the surplus fund on account of damage, loss and depletion occasioned by the negligence, misconduct, misappropriation and other causes averred in the bill. Also, that it be adjudged that the defendant pay into such assurance fund the amount ascertained on such accounting to be due from the defendant, to such fund, and that the defendant, its directors, officers and agents, be enjoined from further retaining the control of or spending in any way the said funds received from the policyholders and annuitants, and constituting the assurance fund and the so-called surplus of the company, and also from doing any other act or thing in

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connection with the funds of the defendant, except to transfer the same to a receiver, and that a receiver be appointed to take possession of all the funds held by the defendant, of every character and description, and administer and distribute the same, as he may be directed by the court.

The defendant demurred to this bill (1) for want of equity; (2) complainant had an adequate remedy at law; (3) complainant, under the laws of New York, had not legal capacity to sue; (4) complainant had no interest in the subject matter of the bill. Other grounds were stated not specially material now to notice.

*Mr. William B. Hornblower*, with whom *Mr. Allan McCulloh* was on the brief, for petitioner:

A demurrer does not admit the correctness of conclusions of law. *Hollis* v. *Richardson*, 13 Gray, 392; *Cragin* v. *Lovell*, 109 U. S. 199.

A fact impossible in law cannot be admitted by a demurrer. *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S. 253; *Gould* v. *Evansville &c. R. R. Co.*, 91 U. S. 536.

Where written instruments are set forth and annexed to the complaint a demurrer does not admit the construction placed by the pleader upon such instruments, nor conclusions or inferences drawn by the pleader therefrom. It is for the court to decide whether the construction placed by the pleader upon the instruments, or the conclusions or inferences of the pleader are correct. *Bonnell* v. *Griswold*, 68 N. Y. 294; *Buffalo Catholic Inst.* v. *Bitter*, 87 N. Y. 250; *Bogardus* v. *N. Y. Life Ins. Co.*, 101 N. Y. 337; *Greeff* v. *Equitable Life Assurance Soc.*, 160 N. Y. 19.

Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. *Dillon* v. *Barnard*, 21 Wall. 430; *Interstate Land Co.* v. *Maxwell Land Co.*, 139 U. S. 577, 578; *Ford* v. *Peering*, 1 Ves. Ch. 71; *Lea* v. *Robeson*, 12



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Gray (Mass.), 280; *Redmond* v. *Dickerson*, 1 Stockt. (N. J.) 507; *Murray* v. *Clarendon*, Law Rep. 9 Eq. 17; *Nesbitt* v. *Berridge*, 8 Law Times, N. S., 76; Story, Eq. Plead. (7th ed.), § 452.

Nor does a demurrer admit matters of inference or argument, or the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to the language of the instrument. *Peckham* v. *Drake*, 9 Mees. & W. 78; *Humble* v. *Hunter*, 12 Law Rep. Q. B. 315; *McArdle* v. *The Irish Iodine Company*, 15 Irish C. L. 146; *Sprigg* v. *Bank of Mount Pleasant*, 14 Pet. 201; *United States* v. *Ames*, 99 U. S. 45; *Finney* v. *Guy*, 189 U. S. 343.

As to recitals, statements of what the papers which are made exhibits purport to show, and conclusions of law, the rule is well settled that only matters of fact well pleaded are admitted by a demurrer, while conclusions of law are not. *United States* v. *Ames*, 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S. 569, 578; *Chicot County* v. *Sherwood*, 148 U. S. 536.

The authorities cited also sustain the propositions that opinions of the pleader as to the propriety of defendant's conduct or as to what is or is not the probable consequence of such conduct are not admitted by a demurrer and are of no probative value; also that general allegations of fraudulent or negligent conduct, or wrongful intent are to be disregarded upon demurrer, unless facts are alleged sufficient to substantiate the allegations.

Whether it be a charge of omission or commission the facts are not alleged, and a mere charge of negligence whether of omission or commission is charging a legal conclusion which is not admitted by the demurrer. *Knowles* v. *New York*, 176 N. Y. 430; *Talcott* v. *Buffalo*, 125 N. Y. 280; *Thomas* v. *N. Y. & G. L. R. Co.*, 139 N. Y. 163, 182; *O'Brien* v. *Fitzgerald*, 6 App. Div. 509, 513; *Franklin Fire Ins. Co.* v. *Jenkins*, 3 Wend. 130; *Van Schaick* v. *Winne*, 16 Barb. 89; *Kranz* v. *Lewis*, 115

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App. Div. 106; 88 N. Y. 579; *People* v. *Equitable Life Ass. Soc.*, 124 N. Y. App. Div. 732.

Allegations of fraud, unsupported by facts fairly tending to sustain the charge, are insufficient. *Schiefer* v. *Freygarg*, 125 N. Y. App. Div. 498.

This society, being a corporation of the State of New York, organized under the laws of New York, the decisions of the highest court of that State, construing its charter and determining the rights of policyholders under the charter and under the laws of the State, will be followed by this court as authoritative and indeed conclusive where no question arising under the statutes or Constitution of the United States is involved. Rev. Stat., § 721; *Elmendorf* v. *Taylor*, 10 Wheat. 153, 159; *United States* v. *Morrison*, 4 Pet. 124, 137; *Green* v. *Neal*, 6 Pet. 291; *Wicomico Co.* v. *Bancroft*, 203 U. S. 112, 118.

A charter granted by special act to a corporation is simply a particular kind of statute. Therefore, the Federal courts hold themselves bound to follow the interpretation placed upon a corporation charter contained in an act of the legislature by the highest court of the State which enacted it. *Smith* v. *Kernochan*, 7 How. 198; *Stone* v. *Wisconsin*, 94 U. S. 181; *Cleveland, P. & A. R. Co.* v. *Franklin Canal Co.*, 5 Fed. Cas. No. 2,890; *Venner* v. *Atchison, T. & S. F. R. Co.*, 28 Fed. Rep. 581, 582, 586; *New Orleans W. W. Co.* v. *Southern Brew. Co.*, 36 Fed. Rep. 833, 834, 836; *Stone* v. *Wisconsin*, 94 U. S. 181, 183; *Waterworks Co.* v. *Refinery Co.*, 35 La. Ann. 1111.

The same principle applies to the construction of "Articles of Incorporation" drawn up under a general statute authorizing the incorporation of certain classes of corporations.

The corporate rights and liabilities growing out of such articles are to be determined by the courts of the State under whose laws the corporation is organized. *Polk* v. *Mutual Reserve* (C. C. S. D., N. Y.); *Merrimac Mining Co.* v. *Levy*, 54 Pa. St. 227 *et seq.*; *Clark* v. *Turner*, 73 Georgia, 1; *First National Bank* v. *Converse*, 200 U. S. 425.

The United States courts have invariably followed the state

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decisions on all questions concerning corporations, where no Federal question was involved. See 11 Cyc. 903–907. See also *Secombe* v. *Railroad Company*, 23 Wall. 108; *Hancock* v. *Louisville Railroad Co.*, 145 U. S. 409; *Park Bank* v. *Remsen*, 158 U. S. 337; *Sioux City Railroad Co.* v. *N. A. Trust Co.*, 173 U. S. 99; *Williams* v. *Gaylord*, 186 U. S. 157; *Schofield* v. *Goodrich Bros.*, 39 C. C. A. 76; *S. C.*, 98 Fed. Rep. 271.

The defendant is organized under the laws of New York. Every person who has joined it as a policyholder has entered into his contract upon the basis of the laws of New York, as limited only by the Constitution and statutes of the United States. Every person becoming a policyholder since the decisions in the *Uhlman Case*, 109 N. Y. 421, and in the *Greeff Case*, 160 N. Y. 19, has had a right to rely upon and is bound by those decisions as part of the law of the State and, therefore, part of his contract. Every such person has presumably entered into his contract in the faith that it was the right and the duty of the society's officers "to retain out of its surplus an amount sufficient to insure the security of its policyholders, in the future as well as at present, and to cover any contingencies that might arise or be fairly anticipated" (160 N. Y. 34), and subject to the ruling that the relations of a policyholder to the company are not those of *cestui que trust* and trustee, but simply that of creditor and debtor. 109 N. Y. 421.

So far as the bill in this suit is based upon any alleged failure to comply with its charter or contract obligations as to the distribution of its entire net surplus, the bill is clearly demurrable under the rulings of the Court of Appeals of New York in *Greeff* v. *Equitable Life Ass. So.*, 160 N. Y. 19.

So far as the bill is based upon the theory of a trust relationship between the policyholders and the society, it is at variance with the settled law of New York as laid down by a long and unbroken line of decisions, culminating in the Uhlman decision.

The relation between the parties arises solely from the contract by the terms of which their rights must be governed.

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The insurance company is not a trustee for the insured, even in case of a tontine policy, much less in the case of an ordinary life policy, such as that held by complainant. If the terms of the contract are violated by the petitioner the remedy of the policyholder is by an action at law to recover damages for breach of contract. *Uhlman* v. *N. Y. Life Ins. Co.*, 109 N. Y. 421; *Everson* v. *Equitable Life*, 68 Fed. Rep. 258; aff'd, U. S. Cir. Ct. App., 71 Fed. Rep. 570; *Hunton* v. *Equitable Life*, 45 Fed. Rep. 661; *St. John* v. *American Mutual Life Ins. Co.*, 13 N. Y. 31; *Cohen* v. *Mutual Life Ins. Co.*, 50 N. Y. 610; *People* v. *Security Life Ins. Co.*, 78 N. Y. 114; *Taylor* v. *Charter Oak Life Ins. Co.*, 9 Daly, 489; aff'd, 8 Abb. N. C. 331; *Bewley* v. *Equitable Life*, 61 How. Pr. 344; *Buford* v. *Equitable Life*, 98 N. Y. Supp. 152; *Pierce* v. *Equitable Life*, 145 Massachusetts, 56; *Greeff* v. *Equitable Life*, 160 N. Y. 19.

The bill cannot be sustained as a bill for fraud because, so far as any fraud affecting complainant's rights is concerned, he has an adequate remedy at law. *Insurance Co.* v. *Bailey*, 13 Wall. 616, 623; *Buzard* v. *Houston*, 119 U. S. 347, 352; *London Guarantee Co., Ltd.*, v. *Doyle*, 130 Fed. Rep. 719; *United States* v. *Bitter Root Co.*, 200 U. S. 451.

Nor does the fact that the bill also seeks discovery and an accounting, make a case for jurisdiction in equity.

Discovery and accounting are no longer sufficient ground for equitable jurisdiction in aid of relief of a legal character. Rev. Stats., § 724; *Stafford* v. *Ensign Mfg. Co.*, 120 Fed. Rep. 480; see also cases *supra*.

So far as the bill is based upon mismanagement and waste of corporate assets by the directors and officers, the only cause of action set forth in the bill is one which should be brought in the name of and for the benefit of the society as a corporation and not in the name of or for the benefit of policyholders who are merely contract creditors and who have not obtained any lien on the assets by way of judgment or otherwise and who have no claim as *cestuis que trustent*, as is perfectly well settled by all the cases. *Graham* v. *Railroad Co.*, 102 U. S. 148.

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Furthermore, it is manifestly impossible to decree an accounting in this suit based upon waste of the society's assets. If this bill is to be sustained either as a bill to recover assets wasted by the officers of the society, or as a bill for a receiver and to wind up the society, there is a clear defect of parties defendant and those officers should be joined. *Minnesota* v. *Northern Securities*, 184 U. S. 199, 235; *Christian* v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233, 241; *Gregory* v. *Stetson*, 133 U. S. 579, 586.

It is the duty of the courts, and particularly of courts of equity, to protect insurance companies from merely harassing and annoying litigations which can be of no substantial benefit to the policyholders.

A court of equity has the right and is bound to consider the relative advantages and disadvantages of granting equitable relief. *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 317.

It withholds the remedies if the result would be unjust, but freely grants them to prevent injustice where the other courts are helpless. *McClure* v. *Leaycraft*, 183 N. Y. 36, 41; *New York* v. *Pine*, 185 U. S. 93; *Penryhn Slate Co.* v. *Granville El. L. & P. Co.*, 181 N. Y. 80; *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243.

*Mr. John R. Dos Passos*, with whom *Mr. Joseph De F. Junkin*, *Mr. George Gordon Battle* and *Mr. H. Snowden Marshall* were on the brief, for respondent:

A trust relation arose, *ab origine*, between the respondent and petitioner, as to the corpus of the property in the possession of the society; and the policy of insurance is in effect a deed of trust, when read in connection with the acts under which the society is incorporated, and its charter and rules. See act of June 24, 1853, chap. 555, Laws of New York, under which petitioner was incorporated; Insurance Laws, § 71. No other relation but that of trust can be evolved from the documents above cited.

An analysis of the relations which the society, its stock-

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holders and the policyholders bear to each other shows that in equity and public policy, all of the property of the society save $100,000 is held by it as trustee for the benefit of the policyholders. It is in substance and in equity no different from any other individual or corporation trustee. The Equitable was incorporated to effect insurance upon the mutual plan.

It became the agent and trustee of all of the policyholders, into whose hands are committed the collection, investment and division of the money of the policyholders, all of which is stamped with an ineffaceable trust. It was not the money of the stockholders by which the business of the Equitable Company has been established. Their so-called capital has been under lock and key in the office of the comptroller.

The mutual life insurance business is a great public trust, and between a policyholder and a company created for the purpose of insuring his life there is the purest and completest fiduciary relationship, and these things being shown, all of the remedies which a court of equity furnishes for a violation of a trust, will naturally follow and be promptly and fully applied. *Charity Corporation* v. *Sutton*, 2 M. & K. R. 406; more fully in 9 Mod. R. 349; 28 Am. & Eng. Ency. of Law, p. 858; *Gifford* v. *Rising*, 51 Hun, 3.

The society held itself out as a mutual company. The organizers were at full liberty to start it as an absolute and unqualified stock company. They accepted the mutual plan—they advertised and represented the society as one conducted solely on the mutual plan for the benefit and protection of its policyholders. See *Mygatt* v. *New York Protection Ins. Co.*, 21 N. Y., 55.

This argument is strengthened by the attitude assumed by the Equitable Society itself. See *Lord* v. *Equitable Life Assurance Co.*, N. Y. Supreme Ct., 2d Div., Sp. Term, and Appellate Div., 94 N. Y. Supp. 65; *Greeff Case*, 160 N. Y. 19.

Under the allegations of the bill we find Mr. Ryan controls the society as the majority stockholder. He is in that position as the result of paying an enormous sum for the shares—either

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because he believes he can realize the same from the assets, or because he believes the possession of the assets is equally valuable. This court should declare that the stockholders have no interest in the property of this society except a dividend of 7 per cent and a return of the $100,000.

Mr. Ryan makes an indirect and insidious attack upon the rights of the policyholders: the stockholders, on the other hand, in the Lord suit, claim everything in sight.

Apart from the foregoing, there was a distinct agreement to set aside a separate and definite fund for the stockholders which constitutes a lien in equity which will be enforced and protected.

Upon well-settled grounds of equity the surplus is notwithstanding a security for the benefit, and impressed with a lien in favor of, the insured, who have a clear right to an accounting, and to preserve the property covered by such lien from fraud, misappropriation, diminution, waste, or destruction, by the society. 3 Pomeroy, Equity Jurisprudence, 1235; *Walker* v. *Brown*, 165 U. S. 664; *Ketcham* v. *St. Louis*, 101 U. S. 306; *Legard* v. *Hodges*, 1 Ves. Jr. 478; *In re Strand Music Hall Co.*, 3 De G., J. & S. 147; 2 Story, Equity Jurisprudence, § 1231.

The Equitable Society, petitioner, is at least a trustee as to the surplus, and is to be held to strict accountability for its non-apportionment, waste or disappearance. See charter, Arts. III, IV & VI; Report of Frick Committee, p. 44; Hendrick Report, pp. 54, 55. See allegations of bill as to surplus.

The complainant fully shows that he is entitled to equitable relief upon the ground, first, of adverse claim by the society and its stockholders as to the title to the surplus, and, second, of fraudulent conduct in the management of the property and surplus in the hands of the company and its misappropriation and waste. See tenth and fourteenth paragraphs of the bill.

The bill shows that the defendant has been guilty of fraud, waste and gross mismanagement of the property of the policyholders. The different charges are set forth in the bill and are given in detail in the report of the Frick Committee and that of the Superintendent of Insurance, and it is not necessary to

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marshal them under specific heads, as they are most prominently treated in the reports above referred to.

These facts fully justify quick and full relief and such a judgment as will render it clear that the assets held by this society belong to the policyholders.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

Even if a court of equity had jurisdiction in a case like this, it is yet proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant. The corporation is one of the largest in the world with its more than half million policyholders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus, reaching into hundreds of millions of dollars in amount. The defendant is in its nature a public institution, and the interests of its policyholders are directly involved in any proceeding looking towards its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policyholders as objects of their bounty. The result of a stopping of this institution and the winding up of its business because, although not in necessary consequence, of the flagrant wrongdoing of some of its former officers and directors, would be most disastrous to the great majority of the people interested in its affairs. Taking all the averments of the bill together, there is not any foundation for apprehension as to the entire solvency of defendant. To place the institution in the hands of a receiver, while it is paying promptly all its obligations and with undoubted resources to continue to pay them, and is daily engaged in taking new business, under other and different management, would be a premature and wholly unnecessary ending of the defendant, and one which it would be mild to characterize as

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ruinous to the interests of hundreds of thousands of people, and really beneficial to none. The enormous and very likely necessary expenses connected with a receivership, its certain failure to give full satisfaction to all, and the very great delays that would accompany the granting of the relief asked, are strong reasons against granting it in the case of a defendant which is paying all its obligations as they are presented. In addition to all these objections, it has happened that since 1905 a new board of directors has been chosen, new officers placed in command and probably an entirely new policy adopted and followed. Although these last-mentioned facts have happened since the filing of the bill in 1905, nevertheless it is not improper to refer to them, as they only constitute a history of the defendant since that time. They are found in public documents in New York, filed and existing of record in its insurance department, and they are the sworn returns of the officers of the defendant made since the change in 1906. They may be referred to, not to contradict the averments of the bill, but to show the officers now in control of the management of the defendant, its present condition, and the fact that it is now in full operation and in the daily discharge of all its obligations as they are presented. The right to an accounting in equity and the winding up of the defendant under these circumstances would have to be most clearly made out before such relief would be granted. A court of equity is bound to consider these facts before it would grant relief of the nature demanded. Such a court takes all the facts into consideration and the relative advantages and disadvantages of granting a relief which lies largely in cases of this nature in the discretion of the court, even if it be assumed that jurisdiction to grant the relief existed at all.

Under these circumstances we proceed to inquire as to the jurisdiction of a court of equity in such a case as is presented by the bill. It might be here added that the history of the *Lord case*, which is referred to in the bill, is to be found in 57 N. Y. Miscell. Rep. 417, and on appeal in 126 App. Div. 907,

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and a still further appeal is pending in the New York Court of Appeals. We do not regard the matter as material, as it only refers to the claims of the stockholders to own the entire surplus in the defendant, and to the alleged attitude of the defendant as to these matters, in not denying their claims. This gives no ground for equitable interference at the suit of a policyholder against the defendant of the nature herein demanded.

As the questions in this case arise upon the defendant's demurrer to the bill of the complainant, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence any construction placed by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by the policyholders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, nor is any other opinion as to future happenings admitted by the demurrer.

Before discussing the merits of the case it is also proper to first decide what force is to be given the decisions of the highest court of New York with reference to the construction of the charter of the defendant and the policy of insurance issued by it. *Greeff* v. *Equitable Life &c.*, 160 N. Y. 19. Although the charter was obtained under a general law of the State of New York relating to the incorporation of insurance companies, yet the construction to be given that act and the charter obtained in pursuance of it pertains to the state courts just as if the charter were granted by a special act of the legislature. Ever since its incorporation under the general law of the State of New York, in 1859, the defendant has always done business

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and had its general home office and its legal residence and domicil in that State. The insurance policy owned by complainant appears on its face to have been executed in New York and there is no averment to the contrary. The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant, and as it is a New York company and the contract is a New York contract, executed and to be carried out therein, its meaning and construction as held by the highest court of the State will be of most persuasive influence, even if not of binding force, in the absence of any Federal question arising in the case. There is no such question here. *Stone* v. *Wisconsin*, 94 U. S. 181, 183; *Park Bank* v. *Remsen*, 158 U. S. 337, 342; *Sioux City &c. Co.* v. *Trust Co.*, 173 U. S. 99. This principle has been so frequently decided that further reference to adjudged cases need not be made.

The suit is brought by complainant for himself, as well as all other policyholders and annuitants of the defendant who may choose to come in and join in the suit, and the company is the sole defendant. No officer of the company or stockholder therein, or any alleged debtor to the company is made a party, and consequently any averment of the continuance in power of the same persons in the board of directors or otherwise is immaterial as a reason for the bringing of the action by the complainant in his own behalf, etc., to recover debts due the defendant, which the defendant will not itself sue for. This is not an action of that nature and there are not present the necessary parties to maintain it if it were. The purpose of the averment is probably to sustain the application for a receiver, made necessary, as alleged, by the wrongdoing of some of the former officers of the defendant. That, however, gives no jurisdiction for an accounting in equity as between a simple debtor and creditor and in the absence of any trust relation between them. A mere creditor as such has no right to that remedy.

We come then to a careful analysis of the other averments

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in the bill, and it is seen that it is largely founded upon the theory of the existence of a trust in favor of the policyholders, past and present of the defendant, as against the defendant, its officers and stockholders, and it is asked that they, and each of them, be decreed to hold the funds and surplus, as they may be ascertained, as trustees for such persons as shall be declared to have interests in such fund and surplus, under the decree of the court to be entered in the case. The complainant alleges that this so-called surplus of the defendant belongs entirely to the policyholders, after making certain deductions, and the defendant holds it, or, at any rate, a large portion of it, in trust for them, and that such is the proper construction of the charter and the policy, and he also avers that defendant has not distributed it from time to time to the policyholders as intended by the charter and the policy. The various allegations in regard to waste, mismanagement and improper investment and reinvestment of the funds of the defendant, and also the alleged fraudulent conduct of the officers guilty of such acts, do not show any inequitable or improper actual distribution of the fund as among the policyholders themselves. Although the effect of such conduct has plainly been to prevent the growth of the surplus to greater proportions than it has reached, there is still no averment anywhere in the bill that the amount of the surplus that was, in fact, distributed was not fairly and equitably distributed to each of the policyholders, according to the amount of his policy and in strict accordance with the rules and regulations theretofore adopted by the defendant for such distribution, which rules had been accepted by the complainant from time to time as such distribution was made. The fact, as alleged, that the amounts were paid to the complainant and accepted by him on the fraudulent representations of the officers that such amounts were all that were due, has no effect upon the question of the equitable and proper distribution of the fund that was, as a matter of fact, actually distributed. Nor does it give a cause of action of an equitable nature. These averments only show waste and mis-

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appropriation of the moneys of the defendant before they ever reached the surplus fund and before any distribution of it was made. In other words, they aver facts of mismanagement of the funds and wrongdoing by others, upon which a cause of action might arise against the officers and stockholders, or other persons guilty of such acts of wrongdoing and waste, in favor of the company itself. They lay no foundation for the jurisdiction of a court of equity in such a case, unless it appears that the relation between the policyholder and the defendant is that the latter is the trustee of the former by reason of the trust relation between them resulting from the insurance policy. The complainant's contention, as above stated, that there is such a trust in the fund mentioned has never been regarded as the law in the State of New York (*Cohen* v. *New York Life Insurance Company*, 50 N. Y. 610; *People* v. *Security Life &c. Co.*, 78 N. Y. 114; *Bewley* v. *Equitable Life &c.*, 61 How. Pr. 344; *Uhlman* v. *New York Life Ins. Co.*, 109 N. Y. 421; and, to the same effect, *Greeff* v. *Equitable Life Assurance Society*, 160 N. Y. 19), nor anywhere else so far as any case has been cited on the subject.

In the *Uhlman case, supra*, the plaintiff was the owner of a policy known as a ten-year dividend system policy, otherwise a "tontine plan" policy, which, it was averred, gave to the holder a special title to the funds derived from the payment of premiums on the policies of that kind and in the particular class to which the policy belonged. The Court of Appeals of New York held that such claim was not well founded; "that it could not be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that the owner of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policyholder and the company was one of contract, measured by the terms of the policy." The holder of a policy of the nature of that referred to in the *Uhlman case* would be certainly as much entitled to claim that the company was a trustee for the holder as would be this

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complainant. Indeed, the policyholder in the *Uhlman case* occupied a much stronger position for making the claim than does this complainant, who is the holder of an ordinary life policy, with rights to participate in the distribution of the surplus according to methods, etc., adopted by the defendant, as already mentioned. The claim was, however, denied by the state court, following the decisions of the New York courts for many years. To hold that a trust is proved in this case by virtue of the charter and policy of insurance is to hold contrary to the decisions of the highest court of the State of New York for a long number of years past without a single decision the other way in all that time.

We also think there is no ground for the contention on the part of the complainant that he, as a policyholder, had any right to an accounting, and to compel the distribution of the surplus fund in other manner or at any other time, or in any other amounts than that provided for in the contract of insurance. By that contract he was entitled to participate in the distribution of some part of the surplus, according to the principles and methods that might be adopted from time to time by the defendant for such distribution, which principles and methods were ratified and accepted by and for every person who should have or claim any interest under the policy. It has been held that under such a policy how much of the surplus shall be distributed to the policyholder and how much shall be held for the security of the defendant and its members is to be decided by the officers and management of the defendant in the exercise of their discretion to distribute, having in mind the present and future business, and, in the absence of any allegations of wrongdoing or mistake by them, their determination must be treated as proper, and their apportionment of the surplus is to be regarded *prima facie* as equitable. *Greeff* v. *Life Insurance Co.*, *supra*. The court further held that manifestly a discretion rests with the defendant in determining how much of the surplus should be distributed to the policyholders and how much should be retained for the security of the defendant and its members,

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having in view the present and future contingencies of the business, and the court remarked that "there was no evidence or allegation that the plaintiff had been inequitably treated by the defendant as between himself and the other policyholders." The frauds and mismanagement mentioned did not in themselves give a policyholder any greater right to a distribution than is mentioned in the contract, and the right depended upon the judgment and discretion of the company as to time and amount.

Nor is there any possible reason for the appointment of a receiver and a real, though not formal, dissolution of the company and the distribution of all its assets, because the fund is not as large as it ought to have been, owing to the misconduct of the officers, and because the defendant has not distributed as much of the surplus as complainant thinks he is entitled to, because of such frauds and misconduct. It is contended, however, that the New York Court of Appeals has held that complainant is entitled to such relief as is demanded herein, and he cites as authority the *Uhlman case*, *supra*, and urges that provided it appear, by proper allegations (such as this bill contains) and proof, that frauds, misappropriation of the funds, etc., have been perpetrated by the officers or agents of the defendant, so as to prevent the proper accumulation of the surplus, the court will grant the relief demanded herein. We think that neither the *Uhlman* nor the *Greeff case* decides any such principle as is asserted by the complainant. After holding, as already stated, that there was no trust existing between a policyholder and even a purely mutual company, reference was made in the former case to the contention of the defendant that the apportionment made by it, or under its direction, was absolutely and, at all events, conclusive upon the policyholders, it was said in the opinion that that was not an accurate statement, and that the plaintiff and others similarly situated had the right, upon proper allegations, of showing that the apportionment made by the defendant was not equitable, or had been based upon erroneous principles, and he had the right to a trial and to make proof of

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such allegations, and if true the court could declare the proper principles upon which the apportionment was to be made so as to become an equitable apportionment. The *Greeff case* simply adopted that statement in the course of the opinion, which is chiefly devoted to the discussion of other matters.

There is nothing in either case to show that any other wrongdoing or fraud was in contemplation of the court than that above mentioned, viz., that the proposed or actual distribution of the money as between the policyholders themselves was not equitable, or was based on erroneous principles.

Wrongdoing, waste, misapplication of funds and actions of that character, affecting the amount of the fund before distribution, were not held to furnish a ground of equitable jurisdiction for an accounting, and it was not held that even frauds in the distribution itself as between policyholders, or the adoption of wrong principles for such distribution, would be ground of jurisdiction in equity. That question was not before the court, and was not decided. It was simply stated that it would afford ground of action, not necessarily ground for equitable jurisdiction. However, this is no such case, as the language used shows was contemplated in the observations of the court in the *Uhlman case.*

So far as the averments in the bill go as to the purchase of the majority of the stock of the defendant by Mr. Ryan, and the execution by him of a deed of trust, we think those averments have no tendency to prove the existence of facts material to the cause of action attempted to be set forth in the bill.

There is no ground of jurisdiction in equity, either for the accounting prayed for or for the appointment of a receiver to wind up the affairs of the defendant on account of the alleged insolvency of the defendant. The complainant at first avers defendant's solvency, and that it is fully able to pay all demands from policyholders, and to perform every contract made by the defendant. The subsequent averment that the defendant is insolvent, because, as a conclusion of law asserted by the pleader, it is responsible to policyholders for excessive sums paid in the



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way of salaries and fees, and also for sums of money lost consequent upon the fraud and waste of the directors or officers of the defendant, all of which are too large for the defendant to pay when demanded, is not admitted by the demurrer, and is not accurate as a conclusion of law. Whether such liability could be legally maintained or whether the defendant would be unable to pay the amount claimed from it when it was properly proved, and judgment duly recovered against it in an action for that purpose, is a mixture of a legal conclusion with a matter of opinion as to the future ability of the defendant to pay such liabilities. And the idea that the defendant itself is liable to policyholders for the frauds or wrongdoing set out in the bill and committed by its officers or members of its board of directors against the defendant and in their personal interests, we regard as without foundation. Such a kind of future possible insolvency furnishes not the slightest ground for present legal action adverse to the defendant. Very likely the defendant could itself maintain an action against those who have been guilty of fraudulent conduct towards it, resulting in financial loss to it, and, of course, those who are alleged to be guilty would have to be made parties. No case is therefore made for an accounting or for a receiver based upon these allegations of the bill. Certainly the court could not give any judgment that the policyholders are the owners of the so-called surplus. It may be that they are. The bill itself avers that the stockholders contend they are the owners of the surplus, or at least of some considerable part of it, and certainly no decree could be made on the subject of such ownership and against the claims of the stockholders, without their presence as parties.

If it be held that there is no trust, then it follows that the suit cannot be maintained in equity on the sole ground of fraud. Such a ground for the maintenance of the suit (even if complainant could otherwise maintain it) is a mere incident to the main ground set forth in the bill. Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and

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where, so far as necessary, discovery may be obtained as well as in equity. Rev. Stat., § 724; *United States* v. *Bitter Root Co.*, 200 U. S. 451, and cases cited.

Complainant also claims jurisdiction in equity on the ground that such an action will prevent a multiplicity of suits. But this is not a case for the application of the doctrine. There can be no claim that the complainant is saved from a multiplicity of suits by the maintenance of this. A single action at law by him against the company would give him all the relief to which he might be entitled. If there are others similarly situated as to claims, they can themselves commence an action. The defendant is not in court asking it to take jurisdiction of its suit against others in order to prevent a multiplicity of suits against it or by it. It does not rest with complainant to urge as a foundation for his suit that the defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits and urges no such ground for jurisdiction in equity of the complainant's suit.

After a careful consideration of all the facts we are of opinion that no cause of action is alleged in the bill for an accounting or for the appointment of a receiver or for other equitable relief. The decree of the Circuit Court of Appeals is therefore

*Reversed.*

MR. JUSTICE DAY, not having heard the case, took no part in its decision.

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# WESTERN UNION TELEGRAPH COMPANY *v.* WILSON.

ERROR TO THE CORPORATION COURT OF THE CITY OF RADFORD, STATE OF VIRGINIA.

No. 65. Argued January 11, 1909.—Decided March 1, 1909.

To give this court jurisdiction under § 709, Rev. Stat., not only must a right under the Constitution of the United States be specially set up, but it must appear that the right was denied in fact or that the judgment could not have been rendered without denying it.

Where the constitutional right was not set up in the original plea, and the record does not disclose the reasons of the state court for refusing to allow a new plea setting up the constitutional right, and the record shows that the refusal might have been sufficiently based on non-Federal grounds, this court cannot review the judgment under § 709, Rev. Stat.

In the absence of action on the part of Congress a State may regulate the conduct of local delivery of telegraph messages after the interstate transit by wire is completed.

Where it does not appear in the record that a telegraph message between two points in the same State had to be transmitted partly through another State, except by a plea which the state court refused, on non-Federal grounds, to allow to be filed, no Federal question is involved and this court cannot review the judgment under § 709, Rev. Stat.

The facts are stated in the opinion.

*Mr. Rush Taggart*, with whom *Mr. John F. Dillon*, *Mr. George H. Fearons* and *Mr. Francis Raymond Stark* were on the brief, for plaintiff in error.

*Mr. James R. Caton*, for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action against the Telegraph Company, in two counts. The first alleges a failure to transmit a message from Graham, Virginia, to East Radford, in the same State, as

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promptly as practicable. The second alleges a failure to deliver the message as promptly as practicable after its arrival at East Radford. Both seek to recover $100, under statutes of the State imposing a forfeiture of that sum in such cases to the sender of the dispatch. The declaration was filed in April, 1906. In June the defendant filed a demurrer and general denial by leave of court. On February 25 of the next year, when the case was about to be tried, the Telegraph Company offered a special plea that its only proper and regular route for transmitting the message was by the way of Bluefield, West Virginia, to Washington, in the District of Columbia, and thence, by relaying, to East Radford; that it did promptly dispatch the message from Graham to Washington, but by mistake sent it from Washington to Cincinnati, causing a delay; that the transmission of the message was interstate commerce, and that therefore the statute of Virginia, act of January 18, 1904, c. 8, § 5, as applied to the part of the transmission outside the State, was void. Constitution of United States, Art. I, § 8, cl. 3. The conclusion of the plea was that the plaintiff could not "recover the penalty in his declaration demanded," and the defendant prayed judgment. The court refused to allow the plea to be filed, and the defendant excepted. A trial followed, at which the plaintiff got a judgment. The errors assigned are that the court refused to allow the defendant to file the above plea, and that it rendered judgment for the plaintiff instead of for the defendant.

This case comes here from a state court, and, of course, therefore it must appear that a Federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *DeSaussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300; *Leathe* v. *Thomas*, 207 U. S. 93, 99. See also *Bachtel* v. *Wilson*, 204 U. S. 36.

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The reasons which led the court to refuse leave to file the plea in this case do not appear. But it is apparent on the face of the record that there are at least two grounds on which it is possible that leave may have been denied before the Federal question was reached. The original demurrer and answer seem to have been late, as they were filed by leave of court. This plea was not offered until more than nine months after the declaration, when the case was called for trial. The circumstances are not disclosed, and it may be that the court, in its discretion, considered that it was unjust for the plaintiff to be called upon to meet a new and serious issue at the last moment. Again, the plea, although it only referred to the section of the statute upon which the first count was based, went, in terms, to the whole declaration, and prayed judgment. It clearly was bad as to the second count. In the absence of any action on the part of Congress, at least, it would not be denied that a State could regulate the conduct of local messengers when the transit by wire was over. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650. It cannot be said that the second count was abandoned, for nothing of the sort appears, and the plea was offered before trial, so that the evidence was not in. If the plea was not good for all that it attempted to cover, it was bad altogether. It may be that if we were dealing with the judgment of a lower court of the United States we should think that there were sufficient grounds for looking through the form to the substance of what the pleader seems to have had most in mind, but when we are considering the action of a state court we cannot say that the local tribunal did not yield to an argument that Saunders would have deemed conclusive and that Gould or Stephen would have regarded as an end of the case. 1 Wms. Saund. 28; Gould Pl., 4th ed., § 104.

The first assignment of error falls for the reasons that we have stated, and the second falls with it. The second is that the court erred in rendering judgment for the plaintiff. But the delay was proved and as the plea was not admitted there was nothing to show that the message went outside the State.

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Moreover the judgment was upon both counts. It is impossible to go further, and to pass upon the delicate question of constitutional law that was argued here.

*Writ of error dismissed.*

## ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *v.* SOWERS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 64. Argued January 8, 1909.—Decided March 1, 1909.

Where the opinion of the state court shows that it considered and denied the validity of a statute of another State, and its binding force to control the right of action asserted, a Federal right specially set up is denied, and this court has jurisdiction to review the judgment under § 709, Rev. Stat.

Congress has only reserved a revisory power over territorial legislation, and a statute duly enacted, and within the legislative power of the Territory, remains in full force until Congress annuls it by exerting such power. *Miner's Bank* v. *Iowa*, 12 Howard, 1, 8.

Under the provisions of the Constitution which declare the supremacy of the National Government, Congress has power to enact, as it has done by §§ 905, 906, Rev. Stat., that the same faith and credit be given in the courts of the States and Territories to public acts, records, and judicial proceedings of the Territories as are given to those of the States under Art. IV, § 1, of the Constitution. *Embry* v. *Palmer*, 107 U. S. 3.

The passage of a legislative act of a Territory is the exercise of authority under the United States. *McLean* v. *Railroad Co.*, 203 U. S. 38, 47.

Where Congress confers on a Territory legislative power extending to all rightful subjects of legislation the Territory has authority to legislate concerning personal injuries and rights of action relating thereto; and so held in regard to the legislative power of New Mexico under act of Sept. 9, 1850, c. 49, 9 Stat. 446.

Actions for personal injuries are transitory and maintainable wherever a court may be found that has jurisdiction of the parties and the sub-

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ject-matter, *Dennick* v. *Railroad Co.*, 103 U. S. 11, and although in such an action the law of the place governs in enforcing the right, the action may be sustained in another jurisdiction when not inconsistent with any local policy. *Stewart* v. *Baltimore & Ohio R. R.* 168 U. S. 445.

No State or Territory can pass laws having force or effect over persons or property beyond its jurisdiction.

A court that only permits a recovery on a cause of action on plaintiff's showing compliance with the conditions imposed by a statute of the Territory in which the cause arose has given to that statute the observance required under § 906, Rev. Stat., and if the action is one otherwise controlled by common-law principles its jurisdiction is not defeated because such statute requires actions of that nature to be brought in the courts of the Territory.

An action for personal injuries sustained in New Mexico may be maintained in the courts of Texas subject to the conditions imposed by the territorial act of New Mexico of March 11, 1903, notwithstanding that act required actions of that nature to be brought in the District Court of the Territory.

99 S. W. Rep. 190, affirmed.

THE facts are stated in the opinion.

*Mr. Andrew H. Culwell*, with whom *Mr. J. W. Terry*, *Mr. Gardiner Lathrop* and *Mr. Aldis B. Browne* were on the brief, for plaintiff in error:

The statute of the Territory of New Mexico herein interposed was a valid and subsisting law at the time of the occurrences stated, and, as such, was entitled to respect and consideration in the courts of a sister jurisdiction, and the failure to so respect said statute was a violation of Art. IV, § 1, of the Constitution of the United States.

In the absence of disapproval by the Congress it must be assumed that the act in question is a valid and binding act, see *Coulter* v. *Stafford*, 56 Fed. Rep. 564; *Hornbuckle* v. *Toombs*, 18 Wall. 655; *Miners' Bank* v. *State of Iowa*, 12 How. 6, and being valid, it should have been applied in this case. Each State has the unquestioned right to regulate the relations between employers and employés and to fix by legislative enactment the liabilities of the former for the negligence of the latter. *South.*

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*Pac. Co.* v. *Schoer*, 114 Fed. Rep. 470; *Buttron* v. *E. P. & N. E. Ry. Co.*, 15 Texas Court Reporter, 339.

While actions for personal injuries may be transitory, wherever determined they shall be tried according to the laws of the country wherein the act was committed; provided such laws are properly called to the attention of the court trying the case. Defendant in error had no right of action created by the laws of Texas. He secured no greater right by coming to Texas to litigate than he would have secured had he remained in New Mexico, and it was the duty of the courts of Texas to apply the laws of the Territory of New Mexico, together with all the restrictions imposed. *Swisher* v. *A., T. & S. F. Ry. Co.*, 90 Pac. Rep. 812; *Poff* v. *New England Telephone & Telegraph Co.*, 55 Atl. Rep. 891; *Dennis* v. *Atlantic Coast Line R. R.*, 49 S. E. Rep. 869; *Rodman* v. *Mo. Pac. Ry. Co.*, 70 Pac. Rep. 642; *"The Harrisburg,"* 119 U. S. 199; *Coyne* v. *So. Pac. Co.*, 155 Fed. Rep. 683; *Davis* v. *N. Y. & N. E. R. R. Co.*, 143 Massachusetts, 301; *LeForest* v. *Tolman*, 117 Massachusetts, 109; *Commonwealth* v. *Metropolitan R. R.*, 107 Massachusetts, 236; *Nonce* v. *R. & D. R. R. Co.*, 33 Fed. Rep. 435; *Pendleton* v. *Hannibal & St. Jo. R. R. Co.*, 18 Pac. Rep. 57; *Burns* v. *Grand Rapids Ry. Co.*, 15 N. E. Rep. 230; *Slater* v. *Mexican Nat. R. R. Co.*, 194 U. S. 120.

The provision in the Constitution making it the duty of courts in one State to give full faith and credit to the decrees and legislative acts of other States is mandatory. *Martin* v. *Pittsburg & Lake Erie R. R.*, 203 U. S. 284; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329; *Banholzer* v. *New York Life Ins. Co.*, 178 U. S. 402; *Cole* v. *Cunningham*, 133 U. S. 107; *Huntington* v. *Attrill*, 146 U. S. 657.

The Territories are included in this constitutional provision. *Mockey* v. *Coxe*, 18 How. 100; *Mehlin* v. *Ice*, 56 Fed. Rep. 12; *Quesenbach* v. *Wagner*, 41 Minnesota, 108.

On the general question of full faith and credit, see *Penn. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Baltimore & Potomac R. R.* v. *Hopkins*, 130 U. S. 210.

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*Mr. Harry Peyton*, with whom *Mr. William H. Robeson* and *Mr. George E. Wallace* were on the brief, for defendant in error:

This being a transitory cause of action, and defendant in error having complied fully with the laws of New Mexico by giving the statutory notice, the courts of the State of Texas had the right to determine its own jurisdiction and that right is not subject to revision by this court. *A., T. & S. F. Ry. Co.* v. *Sowers*, 99 S. W. Rep. 192; *Chambers* v. *B. & O. R. R. Co.*, 207 U. S. 142; *St. Louis, I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281.

The act of the Territory of New Mexico in question, having been submitted to the Congress of the United States and by it disapproved, said act is now and has been since its passage, void and of no force and effect. Compiled Laws of 1897, pp. 43–48; 35 Stat. L., Part 1, p. 573.

That portion of the territorial law, which attempts to make it unlawful to institute or maintain a transitory cause of action outside of the Territory of New Mexico, is unconstitutional and in violation of § 2, Art. IV, of the United States Constitution, as it deprives plaintiff, and all other persons affected by said act, of privileges and immunities guaranteed by the Constitution of the United States and the law of the land. *Cole* v. *Cunningham*, 133 U. S. 107; *Willis* v. *Mo. Pac.*, 61 Texas, 432; *Blake* v. *McClung*, 172 U. S. 239, 256; *Chambers* v. *B. & O. Ry. Co.*, 207 U. S. 142.

That portion of the New Mexico statute which requires suits to be brought in the District Court of the Territory, to the exclusion of the Federal courts, and also to the exclusion of the minor courts, discriminates not only against the courts of other States and Territories, but against the Federal courts themselves, and it is therefore unconstitutional and void. *The Coyne Case*, 155 Fed. Rep. 684; *Ry. Co.* v. *Gutierre*, 111 S. W. Rep. 159.

Mr. Justice Day delivered the opinion of the court.

This is a writ of error to the Court of Civil Appeals for the

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Fourth Supreme Judicial District of the State of Texas. The defendant in error, George A. Sowers, a citizen of Arizona, recovered judgment in the District Court of El Paso County, Texas, in the sum of $5,000, for personal injuries alleged to have been sustained by him while employed in the service of the plaintiff in error as a brakeman in the Territory of New Mexico. The judgment was affirmed by the Court of Civil Appeals. 99 S. W. Rep. 190. Subsequently leave to file a petition in error was denied by the Supreme Court of Texas, and the case was brought here by writ of error to the Court of Civil Appeals.

The defendant in error recovered because of injuries received while riding on the pilot of an engine at Gallup, New Mexico. His injuries are alleged to have been occasioned by the negligence of the railroad company in permitting its track to become soft and out of repair, permitting low joints therein, by reason of which the engine's pilot struck a frog and guard rail, and the plaintiff was injured.

We are not concerned with the questions of general law in actions of negligence which were involved in the case. The Federal question which invites our attention concerns an act of the legislature of New Mexico, passed March 11, 1903 (chapter 33, page 51, Acts of 35th Legislative Assembly of New Mexico). We give this act in full in the margin. [1]

[1] Whereas, it has become customary for persons claiming damages for personal injuries received in this Territory to institute and maintain suits for the recovery thereof in other States and Territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this Territory and the derogation of the dignity of the courts thereof.

Therefore, be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. Hereafter there shall be no civil liability under either the common law or any statute of this Territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing

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It is contended by the plaintiff in error that its effect is to prescribe causes of action for personal injuries, enforceable only in

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suit to recover judgment therefor, an affidavit which shall be made before some officer within this Territory who is authorized to administer oaths, in which the affiant shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries in so far as the same may be known to affiant, the way or manner in which such injuries were caused in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happening of the facts or any part thereof causing such injuries as may at such time be known to affiant, and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of this Territory in and for the county of this Territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this Territory where such corporation has its principal place of business, and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided.

SEC. 2. Whenever any person or corporation shall file a petition in the District Court of this Territory for the county in which said petitioner lives, or, if a corporation, in the District Court for the county in which such corporation has its principal place of business, stating in effect that such petitioner is informed and believes that some party named in such petition claims that he is entitled to damages from said petitioner for personal injuries, inflicted in this Territory upon the party named in said petition or for personal injuries inflicted upon or death caused to some other person for which such party claims to have a cause of action against said petitioner, and stating as near as may be the general character of such injuries and the manner and date said party claims they were inflicted and the place where he claims they were inflicted as near as petitioner knows or is informed as to such facts, and praying that the said party may be required to appear in said court and file therein a statement of his cause of action in the form of a complaint against said petitioner, summons shall issue out of said court and be served and returnable as other process, commanding and requiring

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the District Court of the Territory of New Mexico, and not elsewhere, and that the court of Texas, in maintaining jurisdiction of

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the said party named in said petition to appear in said court and file such statement in the form of a complaint against said petitioner, if he has to make, and upon such complaint being filed by such party as required, the defendant named therein may demur to or answer the same and such further pleading had as the parties may be entitled to or as may be meet and proper as in other cases of a similar character, and from thenceforward such further proceedings shall be had in such causes as in other cases and the same shall be determined upon its merits and final judgment subject, however, to appeal or writ of error, shall be rendered therein either for the petitioner named in said complaint, or for the adverse party, and if the court finds the petitioner guilty of any of the wrongs, injuries or trespasses complained of against him in said statement, such damages shall be assessed against the said petitioner as the law and the facts may require, in the same manner as though said cause had been instituted by the filing of said statement as a complaint.

In event said party complained of in said petition, after being duly served with such summons, shall fail or refuse to appear or file his said statement as required herein, judgment shall be rendered by default against him in favor of the petitioner, as in other cases, and thereupon the court shall try and determine the issues raised by such petition, including the question as to whether or not the petitioner is liable to said party on account of any of the matters or things stated in said petition in any sum of money whatsoever, and if so, in what amount, and final judgment shall be rendered in accordance with the facts and the law, and such judgment as the court may render shall be final and conclusive upon the question of the liability or non-liability of said petitioner to said party, and of the amount of the liability.

SEC. 3. It shall be unlawful for any person to institute, carry on or maintain any suit for the recovery of any such damages in any other State or Territory, and upon its being made to appear to the court in which any proceeding has been instituted in this Territory, as herein provided, that any such suit has also been commenced, or is being maintained in any other State or Territory, contrary to the intent of this act, it shall be the duty of the court to set down for hearing and try and determine the proceeding so pending in this Territory as expeditiously as possible, upon such short notice to the other party thereto or his attorneys as the court may direct; and for the purpose of trying the same said court shall have the power to compel the parties thereto

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the case, and refusing to enforce the territorial statute, denied a Federal right guaranteed by the Constitution and statutes of the United States, requiring such faith and credit to be given in every court within the United States to the public acts, records and judicial proceedings of every other State or Territory as they have, by law, in the courts of the State or Territory from which they are taken.

It is contended that there is no jurisdiction in this court to entertain this writ of error. But we are of opinion that there is jurisdiction. The Revised Statutes of the United States, § 709, authorize this court to review final judgments in the highest court of the State in which a decision in the suit could be had, where any title, right, privilege or immunity under the Federal Constitution or under any statute of or authority exercised under the United States is specially claimed and denied.

The territorial law was specially set up in the case, and was offered in evidence at the trial, and it was held by the Texas court that it was not required to give force and effect to the territorial statute under the Constitution and laws of the United States.

The opinion of the Court of Civil Appeals of Texas shows that

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to plead or answer on such short day as it may determine, and in event the same is triable by jury it shall be the duty of the court, upon motion, to change the venue thereof to such county in said district as in the opinion of the court will afford an opportunity, for the most speedy hearing; but in event such action is not triable by jury then the court shall immediately proceed to try and determine the same, giving such reasonable notice as it may determine, to the parties or their attorneys at any place in the Territory which the court may designate, and witnesses may be compelled by subpœna to attend such place personally, from any part of the Territory and testify, as at present, at such time and place. The institution of any such suit in any other State or Territory shall be construed by the court as a waiver upon the part of the party so instituting the same of the right of trial by jury in the case pending in the courts of this Territory.

SEC. 4. Whenever it shall be made to appear to the District Court of this Territory for the county in which petitioner or plaintiff lives, by any petition filed under section 3 hereof, or by a supplemental petition, or by

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the validity of this statute and its binding force to control the right of action asserted was considered and denied in giving judgment against the plaintiff in error. Such judgment gives this court jurisdiction of the case. *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *St. Louis & Iron Mt. Southern R. R. Co.* v. *Taylor*, 210 U. S. 281, 293; *American Express Co.* v. *Mullins*, decided February 23, 1909, 212 U. S. 311.

It is contended at the outset that inasmuch as this territorial statute has been annulled by act of Congress (35 Stat. Part One, 573), that the act is void from the beginning. The organic act establishing the Territory of New Mexico provides (Compiled Laws of New Mexico, 1897, § 7, p. 43, 9 U. S. Stat. 449):

"That all laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect."

But we are not prepared to hold that the territorial law thus

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any original complaint filed for that purpose, that petitioner or plaintiff fears or has good reason to fear that any other person is threatening or contemplating instituting suit in some other State or Territory to recover damages against petitioner or plaintiff for personal injuries inflicted or death caused in this Territory, or that he has already instituted and is then maintaining such a suit, it shall be the duty of the court upon such bond as the court may require being given, to issue its injunction, *pendente lite*, restraining such suit in any court sitting in any other State or Territory, and at the final hearing, if such facts are found by the court to be true, the court shall make such injunction perpetual; and at the final hearing in all cases instituted under the provisions of section 3 hereof, the party complained of in the petition shall be perpetually enjoined from further instituting or maintaining any suit or action to recover damages by reason of any of the matters or things set up in said petition.

SEC. 5. This act shall not apply to cases in which the person or corporation against whom damages for personal injuries are claimed cannot be duly served with process in this Territory.

SEC. 6. Nothing herein contained shall be construed as in any way preventing any one in this Territory claiming to have a right of action for any such damages from compromising such claim.

SEC. 7. All acts and parts of acts and laws in conflict with this act are hereby repealed, and this act shall be in effect from and after its passage.

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annulled under the power of Congress becomes void from the beginning. Conceding to the fullest extent the powers of Congress over territorial legislation we think such laws, duly enacted and within the legislative power of the Territory, are in force until Congress has exerted its authority to annul them. If this be not so, rights acquired on the faith of territorial laws, passed within the scope of the legislative power of the Territory, may be stricken down by the retroactive effect of an act of Congress annuling such legislation. All right to legislate would be at a standstill until that body should act. Congress might not be in session or its action delayed, rendering the Territory powerless even in cases of emergency to pass necessary laws. We think Congress has only reserved a revisory power over territorial legislation. *Miners' Bank* v. *Iowa*, 12 How. 1, 8.

To make effectual the full faith and credit clause of the Constitution (Art. IV, § 1), Congress passed the act of May 26, 1790, 1 Stat. 122, c. 11. This act made provision for the authentication of the records, judicial proceedings and acts of the legislatures of the several States, and provided that the same should have such faith and credit given them in every State within the United States as they have by law or usage in the courts of the State from which the records are or shall be taken. This act did not include the Territories.

On March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the Territories of the United States and countries subject to the jurisdiction thereof. 2 Stat. 298, c. 56. Those statutory enactments subsequently became §§ 905 and 906 of the Revised Statutes. Section 905 applies to judicial proceedings, and § 906 to records, etc., kept in offices not pertaining to courts. In the case of *Embry* v. *Palmer*, 107 U. S. 3, it was held that a judgment of the Supreme Court of the District of Columbia, under the legislation of Congress (Rev. Stat., § 905) was conclusive in every State of the Union, except for such causes as would be sufficient to set it aside in the district. The opinion of the court, delivered by Mr. Justice Matthews,

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reached this conclusion because of § 905 of the Revised Statutes, above quoted. In considering the constitutional power to pass this act, speaking for the court, the learned justice said (p. 9):

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on article IV, § 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the district which the Constitution has given to Congress."

This language is equally applicable to legislative acts of the Territory, as the passage of such laws is the exercise of authority under the United States. *New Mexico ex rel. McLean* v. *Railroad Company*, 203 U. S. 38, 47.

Section 906 of the Revised Statutes requires every court within the United States to give the same faith and credit to the acts of the Territory as they have by law or usage in the courts of the Territory from which they are taken. The Federal question then is, Did the court of Texas, in denying any force and validity to the New Mexico statute, violate this requirement of the Federal statute (§ 906) passed under the power conferred upon Congress by the Constitution?

Preliminary to the consideration of the effect of the statute in other jurisdictions, we may notice a question made as to the power of the Territory to pass it.



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Sections 7 and 17 of the organic act of the Territory of New Mexico provide (Act of September 9, 1850, c. 49, 9 Stat. 446, 449; Comp. Laws New Mexico, 1897, p. 43):

"SEC. 7. That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. . . ."

"SEC. 17. That the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States."

It is contended by the defendant in error that the effect of these statutes is to put the common law, regulating the recovery of actions for personal injuries, in force in the Territory, and that there is no authority to pass laws regulating recovery for injuries of the character attempted. But we are of opinion that the legislative power conferred, extending to all rightful subjects of legislation, did give the Territory authority to legislate concerning the subject of personal injuries, and to pass laws respecting rights of action of that character. It is contended for the plaintiff in error that this statute of New Mexico is creative of a new statutory cause of action, taking the place of any common law rights and remedies, and that in such cases it is within the legislative authority to make laws local and exclusive in their character.

In many States it has been held that such causes of action, created by state statute, could not be sued upon in other jurisdictions. This doctrine is, however, contrary to the holding of this court in *Dennick* v. *Railroad Co.*, 103 U. S. 11. Mr. Justice Miller, in delivering the opinion of the court in that case, said, p. 18:

"It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred."

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An action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject matter. Rorer on Interstate Law, 154, 155; *McKenna* v. *Fiske*, 1 How. 242; *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18.

Undoubtedly, where the cause of action is created by the State, as is the action to recover for death by wrongful injury, there is no objection to the enforcement of the law because it arose in another jurisdiction. *Northern Pacific Railroad Co.* v. *Babcock*, 154 U. S. 190; *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 449. Dealing with this subject in *Mexican National R. R. Co.* v. *Slater*, 194 U. S. 120, 126, this court said:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. (Ind.) 71; *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

It is then the settled law of this court that in such statutory

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actions the law of the place is to govern in enforcing the right in another jurisdiction, but such actions may be sustained in other jurisdictions when not inconsistent with any local policy of the State wherein the suit is brought. *Stewart* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 445, *supra*.

Assuming that the Territory may legislate upon this subject, when we turn to the act what do we find to be its provisions? Section 1 of the act provides that "hereafter there shall be no civil liability under either the common law or any statute of this Territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory"—unless certain things are done. It is required that the person injured shall make and serve, within 90 days after such injuries shall have been inflicted, and 30 days before beginning suit, an affidavit upon the person against whom damages are claimed; which affidavit shall state the name and address of the affiant, the character and extent of such injuries so far as the same may be known to the affiant, the way or manner in which such injuries were caused, the names and addresses of such witnesses to the happening of the facts causing the injuries as may be known to the affiant at the time, and the section concludes: "and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the District Court of this Territory in and for the county of this Territory where the claimant or person against whom such claim is asserted resides, or, in event such claim asserted against a corporation, in the county in this Territory where such corporation has its principal place of business, and said suit after having been commenced shall not be dismissed by plaintiff unless by written consent of the defendant filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided."

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This section does not undertake to create a new and statutory cause of action, but refers to the common law or previous statutes of the Territory governing actions for personal injuries or wrongful death. It puts a condition upon such actions, requiring the making of the affidavit and the service thereof, within 90 days after the injury and 30 days before commencing suit, and provides that such cause of action shall be prosecuted within one year, and undertakes to make the same maintainable only in the District Court of the Territory. If such an action for personal injuries were tried in the Territory it would be controlled by common law principles, so far as the right of recovery is concerned, provided, of course, that the statutory requirements as to the affidavit and the time of beginning the action had been complied with. At the trial counsel for plaintiff in error stated: "It is admitted that the common law is in force in the Territory of New Mexico, and that the accident happened in the Territory of New Mexico."

Such suit at common law might be maintained in any court of general jurisdiction, where service could be had upon the defendant. The question here is, when such court does entertain a suit of that kind what is it required to do in order to give effect to the statutory requirements of § 906 of the Revised Statutes?

The object of this statute of the United States was to give to the public acts of each Territory the same faith and credit in every court within the United States as they are entitled to, by law, in the Territory where they are enacted. Before this statute the effect which would have been given to the judgment of the court of a Territory rested alone upon principles of comity. These acts are now, and by force of the statute, to be given the force and effect that they would be given in the Territory which passed them, that is, the cause of action is not to be enlarged, when regulated by the legislation of a Territory, because the party sees fit to go to another jurisdiction where he can obtain service upon the defendant, and there prosecute his suit.

In the present case, in determining the merits of the cause of action, common law principles were applied in the Texas court

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as they would have been in the court of New Mexico. So far as this court is concerned, we must assume that the principles governing such actions for negligence were properly given to the jury in the instructions of the court and controlled in the decision of the case.

This record discloses that the affidavit required by the statute of New Mexico was made and served within the time prescribed, and that the action was commenced within one year. The only feature of the New Mexico statute which was disregarded was the requirement that suit should be brought only in the District Court of the Territory. But we are of opinion that where an action is brought in another jurisdiction based upon common law principles, although having certain statutory restrictions, such as are found in this act, as to the making of an affidavit and limiting the time of prosecuting the suit, full faith and credit is given to the law, when the recovery is permitted, subject to the restrictions upon the right of action imposed in the Territory enacting the statute. Of course, the Territory of New Mexico could pass no law having force and effect over persons or property without its jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714, 722; Story on the Conflict of Laws, § 539.

"Each State may, subject to the limitations of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. *St. Louis Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 285."

The Territory of New Mexico has a right to pass laws regulating recovery for injuries incurred within the Territory. *Martin* v. *Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284. It has a right, under § 906 of the Revised Statutes, to require other States when suits are therein brought to recover for an injury incurred within the Territory to observe the conditions imposed upon such causes of action, although otherwise controlled by common law principles. But when it is shown that the court in the

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other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute referred to.

Finding no error in the judgment of the Court of Civil Appeals of Texas, the same is

*Affirmed.*

MR. JUSTICE HOLMES, dissenting.

I agree to pretty much everything that is said on behalf of the majority of the court, except the conclusion reached. But my trouble is this. The Territory could have abolished the right of action altogether if it had seen fit. It said by its statutes that it would not do that, but would adopt the common law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all. One of those conditions was that the party should sue in the Territory. Section 1. A condition that goes to the right conditions it everywhere. *Davis* v. *Mills*, 194 U. S. 451, 457. I am willing to assume that the statute could not prohibit a suit in another State, and, indeed, it recognized that in that particular it might be disobeyed with effect. Section 3. But I do not see why the condition in § 1 was not valid and important. If it had been complied with there might have been a different result.

MR. JUSTICE MCKENNA concurs in this dissent.

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# MAMMOTH MINING COMPANY *v.* GRAND CENTRAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH AND THE DISTRICT COURT OF JUAB COUNTY, STATE OF UTAH.

No. 97. Argued January 28, 1909.—Decided March 8, 1909.

In reviewing the judgment of a state court under § 709, Rev. Stat., findings of fact resting on a false definition of a right existing under a Federal statute cannot be assumed to be correct and may be reconsidered; but the evidence will not be discussed here, and this court considers only whether there has been a mistake of law.

Where the trial court merely called in an advisory jury and in the highest court of the State on appeal the evidence was discussed and the findings reëstablished, reversal by this court can only be based on errors, if any, in opinion of the highest court.

Where the state court has found on the facts based on the evidence that the vein of plaintiff in error did not extend under the claim of defendant in error, an expression of opinion that there is a difference between a lode sufficient to validate a location under § 2322, Rev. Stat., and an apex giving extralateral rights (not decided by this court, *Lawson* v. *United States Mining Co.*, 207 U. S. 1) is not necessary to the result, and does not deny a Federal right and this court has not jurisdiction to review the judgment under § 709, Rev. Stat.

Writ of error to review 29 Utah, 490, dismissed.

THE facts are stated in the opinion.

*Mr. Charles J. Hughes, Junior,* with whom *Mr. R. N. Baskin, Mr. Everard Bierer, Junior, Mr. Aldis B. Browne* and *Mr. Alexander Britton* were on the brief, for plaintiff in error.

*Mr. William H. Dickson,* with whom *Mr. Henry P. Henderson* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was begun by the Grand Central Mining Company

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to recover for the removal of ores from beneath the surface of its Silveropolis mining claim, and for an injunction. The defendant, the Mammoth Mining Company, filed a counter claim, setting up that it was the owner of certain mining claims, especially the First Northern Extension of the Mammoth Mining Claim, Lot No. 38, being senior to all the other claims concerned; the Bradley, and the Golden King; the last two being to the west of the Mammoth Extension, between it and the Silveropolis, with more or less overlapping; and that the vein or lode from which the ore in question was taken has a part of its apex in the Mammoth Extension for 1,100 feet; which, if true, would entitle the Mammoth Company to the ore. It prayed that the plaintiff's claim be adjudged invalid, both because of the foregoing alleged facts and on the ground that the plaintiff's patent gave it no right to the ore unless the apex of the lode was within its claim, and it prayed also that the Mammoth Company's title be quieted and confirmed. After a trial the counter claim of the Mammoth Company was rejected; the judgment of the trial court was affirmed by the Supreme Court of Utah in an elaborate decision, and then the case was brought here, on the counter claim alone.

Both of the parties are Utah corporations, and the suit was in a state court. The ground on which this court is asked to take jurisdiction is that the decision of the Supreme Court on the facts rested on a definition of a lode or vein which the plaintiff in error contests, and therefore turned on the construction of Rev. Stats., § 2322. There is a faint argument on the other point that we have mentioned, that the defendant in error had no right to ore beneath the surface of the Silveropolis claim, unless from a vein having its apex there, but that, if relevant, has been disposed of by previous decisions of this court and may be disregarded. *St. Louis Mining & Milling Co.* v. *Montana Mining Co.*, 194 U. S. 235. So also may an attempt to reopen the findings of fact. Of course, if these findings rest on a false definition they may have to be reconsidered, and cannot be assumed to be correct. But the evidence will not be discussed here. The only

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question with which we shall deal is whether the plaintiff in error makes out the alleged mistake of law. *Chrisman* v. *Miller*, 197 U. S. 313, 319; *Egan* v. *Hart*, 165 U. S. 188, 189.

The record discloses that the Mammoth Company in its cross complaint set up the proposition as the limits of the title under the Silveropolis claim that we have dismissed, and that it alleged that it set up a title under the laws of the United States. The record also shows that at the trial the judge called in an advisory jury, and that he gave them certain instructions as to what constitutes the apex of a vein, &c.; and it is argued that it must be assumed that the judge, when he made his findings of fact adverse to the Mammoth Company was governed by the same views of the law. But the cross complaint by itself shows no warrant for this writ of error, and as the case went to the Supreme Court by appeal, and the facts were discussed at great length and reëstablished by that court, it is in the opinion of that court alone, if anywhere, that the supposed error must be found. Indeed, the instructions to the jury were treated as immaterial by that court, and held not to be a ground for reversal, even if wrong, if the judgment was right upon the evidence. It is necessary, therefore, to show the nature of the case and of the course of reasoning followed by the Supreme Court of the State.

For the character of the country where the question arises we quote from the judgment under review:

"The mines are found in a lime belt which covers about two square miles, and is the great producing area of the Tintic district. In some places the limestone beds are upturned, large areas tilted upon edge, the beds dipping nearly vertically down; while in other places they dip at lower angles, and in special areas the dips are quite uniform; and again, though, it seems, not frequently, anticlinals exist. This limestone is surrounded on all sides, except the north, by igneous rocks. The sedimentary rocks are broken up and fractured, evidently the result of igneous intrusion. The limestone carries some iron, the different forms of iron oxide, also some manganese, and in places the limestone is crushed, crumbled, and brecciated. . . . The

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surface of the limestone area, wherever exposed, is marked with innumerable seams, cracks, and small fissures filled with carbonate of lime, stained more or less with iron, and sometimes manganese. Quartz, spar, and other materials, characteristic, in general, of mineral-bearing limestone areas, are present, and in places the surface is brecciated and recemented. A trace of mineral, and of one or more of the precious metals, and, in places, more than a trace, even where there is no known vein, seems also to be a characteristic of that lime belt."

In the belt thus described the Mammoth Company's Lot 38 runs northeasterly, and the Silveropolis claim about north, its southerly boundary being considerably further north than the southern boundary of Lot 38. It is admitted that the apex of a vein extends northerly in Lot 38 from its southern boundary for six hundred and ninety feet to a point ninety feet south of the southern boundary of the Silveropolis claim extended. But the Utah courts found that at that point the vein on its strike and at its apex wholly departs from Lot 38, in a northwesterly and then in a more northerly direction, whereas the Mammoth Company contends that it continues in that lot to a line 1,100 feet distant from its southerly line, and that large deposits of ore, taken by the court to represent the strike of the vein, really are upon its dip.

In coming to its conclusion the Supreme Court, after stating the presumption that the ore belongs to the owner of the claim under which it is found, lays great stress on the fact that the Mammoth Company could not locate the hanging or foot wall of the supposed vein north of the point at which the vein was found to leave Lot 38. It goes on to find that by the preponderance of evidence the surface indications for a long distance east and west of Lot 38, north of the point indicated above, are the same as those in the lot. It reaches the same result from assays of numerous samples, taken from the open cuts and exposures in the same part of the lot. It then elaborately discusses the workings underground. It says that the fact is clear that the ore always is found near the line of the great ore bodies,

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whether they be on the strike or on the dip of the vein, northwesterly beyond the above-mentioned point. It points out that the boundaries of a vein north of that point, and apex in Lot 38, and a strike and dip that would carry the vein to and include the disputed ore bodies, have been left in doubt, at least, notwithstanding great efforts by drifts, cross-cuts, raises and winzes, to prove that the vein exists. This doubt is explained by the witnesses for the Grand Central Company and by the court, on the ground that the vein was formed by replacement or metasomatic action within narrowly limited areas, and that the boundaries of the vein are the limits of the ore. Underground as at the surface, excepting those from the vicinity of the back fissure and the ore channel, the assays show no mineralization not common generally through that limestone region. Underground as at the surface, the Mammoth Company cannot locate the hangings and the foot walls of the vein.

The court observes that a vein cannot be said to exist merely because rock is crushed, shattered, or even fissured, and that what will constitute one must depend somewhat upon the nature of the country in which it is alleged to be found. It fully recognizes that a true vein may be barren in places, but concludes that to allow the Mammoth Company's claim would amount practically to declaring the whole limestone area to be one vein, thousands of feet wide. After calling attention to the admitted fact that the vein has well-defined boundaries and strike from the south end of Lot 38 for about seven hundred feet, it finds that the same conditions continue to exist from there on in a northwesterly direction outside the limits of the lot, and that the ore bodies found outside those limits are on the strike and not upon the dip. It calls attention to the almost vertical dip of the vein at specified places, and is of opinion from that and other facts discussed in detail that no dip is shown that could carry a vein from Lot 38 to the ore bodies in dispute. It finds its conclusions confirmed by the conduct of the Mammoth Company during all the years of operation in its mine, making a strong argument that it is not necessary to recite.

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The counsel for the Mammoth Company contends that the Supreme Court of Utah based its judgment upon assays and a definition that fails to recognize that a vein may be a vein, although it is in soft rock, like limestone, where the walls of the fissures have been eaten into by the mineralizing solutions, and although the surface water has leached the valuable mineral constituents from the upper portion down into the vein. But the abridged statement that we have made of the material part of its reasoning shows that assays played but a small part, and that definitions played no important one in leading to the conclusion. On the contrary, most if not all of the findings that we have stated deal with pure matters of fact. So far as definitions go, the court adopted those that were quoted in *Iron Silver Mining Company* v. *Cheesman*, 116 U. S. 529. It is true that it expressed the opinion that there is a difference between a lode sufficient to validate a location and an apex giving extralateral rights. But without intimating agreement or disagreement with this view, *Lawson* v. *United States Mining Co.*, 207 U. S. 1, it is enough for us to say that it was not necessary to the result. The court was against the Mammoth Company on the facts, it did not accept its theory of leaching, &c., but was of opinion that the ore deposits were made within originally narrow boundaries by the mineral solutions rising through the main fissure from the deep.

We deem it unnecessary to discuss the opinion below at greater length, as we think it entirely plain, upon a study of the lengthy and careful discussion, that it presents no question that we can be asked to review. The plaintiff in error makes an elaborate argument upon the evidence that the Supreme Court was wrong in its findings of fact. We repeat that upon the writ of error we shall not go into such matters. It is enough to say that upon the facts as found neither the record nor the opinion presents a Federal question, and that therefore the writs of error must be dismissed.

*Writs of error dismissed.*

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# STATE OF MISSOURI *v.* STATE OF KANSAS.

IN EQUITY.

No. 6, Original. Argued February 23, 1909.—Decided March 22, 1909.

The boundary line between Missouri and Kansas is and remains, notwithstanding its shifting position by erosion, the middle of the Missouri River from a point opposite the middle of the mouth of the Kansas or Kaw River.

The act of June 7, 1836, c. 86, 5 Stat. 34, altering the western boundary of Missouri, is to be construed in the light of extrinsic facts; and, as so construed, its object was not to add territory to the State but to substitute the Missouri River as a practical boundary, so far as possible, instead of an ideal line along a meridian.

The result of this decision is that an island in the Missouri River west of the centre of its main channel, as that channel now exists, belongs to Kansas, notwithstanding such island is east of the original boundary line of Missouri.

THE facts are stated in the opinion.

*Mr. Elliott W. Major*, Attorney General of the State of Missouri, and *Mr. Hunter M. Meriwether*, with whom *Mr. Henry M. Beardsley* was on the brief, for complainant:

There is no dispute as to the location of the western boundary of Missouri for the two and one-half or three miles north of the mouth of the Kansas River, prior to 1837. See constitution of Missouri of 1820. The west line of the State was therein laid down as a meridian line passing through the mouth of the Kansas River.

The maps in evidence show that in 1836–37 the Missouri River had moved to the east so far that the first two and one-half miles of the old west boundary line surveyed by Sullivan were in the river.

On March 28, 1837, the land lying between the old state boundary and the Missouri River was added to the State, and

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no change was made in the boundary line except where land lay between the old state-line and the river. Act of June 7, 1836, c. 86, 5 Stat. 34. It is clear from this act that the boundary of the State was not changed except where there were lands lying between the old boundary and the Missouri River, in which case the boundary was *extended* to the river. Since, therefore, the old boundary line was already in the stream for the first two and one-half miles north of the mouth of the Kansas River, no lands were added there and no change of boundary there took place.

There is no evidence to support the contention that Missouri and Kansas have by a long course of conduct regarded the shifting channel of the Missouri River over these two and one-half miles as the border line between the States rather than the true north and south line. It requires the consent of the States and Congress to change a state boundary; so no change could be made without the concurrent action of all three sovereignties. But there is no evidence that the States have agreed upon any other than the true boundary. Kansas in framing her constitution made her east line in terms "the west line of the State of Missouri." Much stress was by Kansas at the hearing put upon the language of the several statutes of the State of Missouri giving the boundaries of the counties of Platte and Clay and Jackson in Missouri and of the State of Kansas giving boundaries of the counties of Wyandotte and Johnson in that State. The legislative acts can in no wise be regarded as attempts to define the boundaries of the State. Such boundaries could not be so defined. They, on the other hand, give the boundaries of these counties with reference to the land as it at the time lay. The state line was in the Missouri River. There was no desire to take account, in fixing county boundaries, of land lying then within the river.

The determination of the true line as the western boundary of Missouri, at the point in question, depends entirely upon the construction of the terms of the act of June 7, 1836, extending western boundary to the Missouri River. Missouri, by an

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amendment to its constitution, adopted the line thus established but it did not cede or waive its rights of soil and jurisdiction over any portion of its original territory. It is established by the proof that at the point in dispute the western boundary of the State was already in the Missouri River.

The rule is that where a power possesses a river and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river. *Howard* v. *Ingersoll*, 13 Howard, 381.

If there was anything doubtful or indefinite in the language of the act of June 7, 1836, or in the line as established by it, the subsequent acts of the parties affected thereby as well as local conditions determine a proper construction of what was meant by the act, but the language, itself, is plain and no other assistance is needed. *Alabama* v. *Georgia*, 24 How. 505.

*Mr. F. S. Jackson*, Attorney General of the State of Kansas, *Mr. John S. Dawson* and *Mr. C. C. Coleman*, for defendant, submitted:

The act of 1836 extending the jurisdiction of the State of Missouri over the lands between said State and the Missouri River, and extending the western boundary of said State to the Missouri River, was an authoritative establishment of the boundary line of that State to the meridian line of the channel of the Missouri River from the mouth of the Kansas River north to the northern boundary of the State. See Memorial, General Assembly of Missouri, approved January 15, 1831; *St. Joseph R. R. Co.* v. *Devereux*, 41 Fed. Rep. 14.

The State of Missouri, having accepted such determination of its boundary and all of the officials and people of the State having acted in accordance therewith since 1836 until the present time, and her sister States of Kansas and Nebraska having also acted on such understanding, such boundary line of the State of Missouri became fixed on the thread of the

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Missouri River channel at all points above the mouth of the Kansas River, and such boundary cannot now be questioned by the State of Missouri.

Where a river is declared to be the boundary between States, if such river suddenly change its course or desert the original channel as the result of a great flood or what is commonly known as an avulsion, the boundary between such States remains in the middle of the deserted river bed, but if the river change imperceptibly, from natural causes, the river as it runs continues to be the boundary between the two States. *Cooley* v. *Golden*, 52 Mo. App. Rep. 229; *Iowa* v. *Nebraska*, 143 U. S. 359.

Where a river is the boundary-line between two States, the jurisdiction of said States is concurrent over the channel of the river to the meridian line of said channel, but where an island arises and exists on the bed of said river and the main channel of the river flows to one side only of the island, such island is within the jurisdiction of the State nearest to which it is located. *McBaine* v. *Johnson*, 155 Missouri, 203; *East Omaha Land Co.* v. *Hanson*, 117 Iowa, 97; *S. C.*, 90 N. W. Rep. 706; *De Long* v. *Olsan*, 63 Nebraska, 331; *S. C.*, 88 N. W. Rep. 514.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to establish the western boundary of the State of Missouri for a short distance above Kansas City in that State. The object of Missouri is to maintain title to an island of about four hundred acres in the Missouri River, now lying close to Kansas City, Missouri, and Kansas City, Kansas. The State of Kansas claims the same island by answer and what it terms a crossbill. A few words will explain the issue between the parties. When Missouri was admitted to the Union its western boundary at this point was a meridian running due north. There was land between a part of this line and the Missouri River. By treaty with the Indians and act



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of Congress on the petition of Missouri, that State was granted jurisdiction over such land and its boundary was extended to the Missouri River. Since that time the river has been moving eastward by gradual erosion, and at the place in controversy has passed to the east of the original line. The land in question lies to the east of the line and the claim of Missouri is that, whatever the change in the river, its jurisdiction remains to that line.

Missouri fortifies its claim by an allegation that the line at the place in controversy never was changed. According to the bill, the line as surveyed began at a point on the left bank of the Missouri River, opposite the mouth of the Kansas or Kaw, for two miles and a half "practically conformed with the left bank of the Missouri," and by the shifting of the stream was in the river when the act of Congress was passed, so that there was no land to be added there, and the original boundary remained. Kansas denies that the original line conformed to the left bank of the river, and says that even if Missouri is right with regard to the facts, the result of the change was to make the Missouri River the boundary between the States from the north to the point where the Missouri and the Kansas meet.

To decide the case it is necessary to construe the laws by which the boundary of Missouri was changed. The first step to that end was a memorial of the General Assembly of Missouri to Congress, dated January 15, 1831. The sum of it is this. Many inconveniences have arisen from the improvident manner in which parts of the boundaries have been designated. When the state government was formed the whole country on the west and north was a wilderness and its geography unwritten. The precise position of that part of the line passing through the middle of the mouth of the Kansas River, which lies north of the Missouri, is unknown, but it is believed to run almost parallel with the course of the stream, so as to leave a narrow strip of land varying in breadth from fifteen to thirty miles. Great calamities are to be feared from the Indians on

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the frontier. Therefore it is necessary to interpose, "whenever it is possible, some visible boundary and natural barrier between the Indians and the whites." The Missouri River will afford this barrier "by extending the north boundary of this State in a straight line westward, until it strikes the Missouri, so as to include within this State the small district of country between that line and the river." There is more, but the main point of the memorial is to secure a natural barrier between Indians and whites, and, in addition, easier access to "the only great road to market." A few square miles, more or less, of savage territory were of no account, but the object was to get the river for a bound.

There was a report to the Senate on April 8, 1834, which adopted the foregoing reasons, and recommended making the Missouri River "the western boundary to the mouth of the Kansas River." Senate Doc. No. 263, 23d Cong. 1st Sess. On February 12, 1836, there was a report to the House of Representatives on the same subject. It referred to a bill that had been reported, authorizing the President to run the boundary line, and mentioned that the bill had been amended by directing the line to be run from the mouth of the Kansas River up the Missouri River, etc. It stated that the Indian title to the lands in question might be extinguished and ought to be, because those lands ought to form part of the State of Missouri. As a reason it mentioned that when Missouri was admitted into the Union it was expected that other States would be formed on the west, in which case the use of the Missouri would have been equally convenient, whether it was the border line or not; since then, however, the Indians had been located on the frontier, thus hampering access to the river. As a final argument it added that to make the river the boundary would be for the advantage of both the Indians and the whites. In conclusion, "to carry into effect the ultimate object of the resolution," it reported "A Bill to extend the western boundary of the State of Missouri to the Missouri River." H. R. No. 379, 24th Cong. 1st Sess. This bill was passed, and became the act of Congress

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on which this controversy turns. It provides that "when the Indian title to all the lands lying between the State of Missouri and the Missouri River shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the State of Missouri, and the western boundary of said State shall be then extended to the Missouri River." These are the only material words. Act of June 7, 1836, c. 86, 5 Stat. 34.

In anticipation of the action of Congress the constitution of Missouri was amended as follows: "That the boundary of the State be so altered and extended as to include all that tract of land lying on the north side of the Missouri River, and west of the present boundary of this State, so that the same shall be bounded on the south by the middle of the main channel of the Missouri River, and on the north by the present northern boundary line of the State, as established by the Constitution, when the same is continued in a right line to the west, or to include so much of said tract of land as Congress may assent." Amendment ratified at the Session of 1834–5, Article II, § 4. Mo. Rev. Sts. 1856, p. 91. Then, on December 16, 1836, the State assented to the act of Congress by "An Act to express the assent of the State of Missouri to the extension of the western boundary line of the State." Laws 1st Sess. 9th Genl. Assembly, p. 28; and, on January 17, 1837, a copy was transmitted to Congress by the President. Meantime, on September 17, 1836, a treaty was made with the Indians, in which they expressed their belief in the advantage of a natural boundary between them and the whites and released their claims. Indian Affairs. Laws and Treaties. Compiled by Kappler, 1904, p. 468. On March 28, 1837, the President, by proclamation, declared that the Indian title to lands had been extinguished, in pursuance of the condition in the act of Congress, and the act went into full effect. 5 Stats. 802. Appendix No. 1.

Whatever might be the interpretation of the act taken by itself and applied between two long settled communities, we think that the circumstances and the history of the steps that led to it show that the object throughout was that expressed

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by the memorial; as we have said, not to gain some square miles of wilderness, but to substitute the Missouri River for an ideal line as the western boundary of the State, so far as possible, that is from the northern boundary to the mouth of the Kaw. That this was understood by Missouri to be the effect of the act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river; beginning with the act that organized the county of Platte, approved December 31, 1838, Mo. Laws, 1838, pp. 23–25, and going on through the Revised Statutes of 1855, p. 459, § 12 (Clay), p. 466, § 33 (Platte), p. 478, § 65 (Jackson), etc., to 2 Revised Statutes, 1879, ch. 94, §§ 5177, 5198 & 5237. The construction is contemporaneous and long continued, and we regard it as clear. It is confirmed by the cases of *Cooley* v. *Golden*, 52 Mo. App. 229, and *St. Joseph & G. I. R. Co.* v. *Devereux*, 41 Fed. Rep. 14, both of which cases notice that the act extended the boundary to the river, and not merely to the bank.

It follows upon our interpretation that it is unnecessary to consider the evidence as to precisely where the line as surveyed ran from opposite the mouth of the Kansas or Kaw. If the understanding both of the United States and the State had not been a wholesale adoption of the river as a boundary, without any niceties, still, as the cession "to the river" extended to the center of the stream, it might be argued that even on Missouri's evidence there probably was a strip ceded at the place in dispute. But from the view that we take such refinements are out of place. The act has to be read with reference to extrinsic facts because it fixes no limits except by implication. We are of opinion that the limit implied is a point in the middle of the Missouri opposite the middle of the mouth of the Kaw.

*Decree for the defendant.*

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## BONNER *v.* GORMAN, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 102. Submitted February 23, 1909.—Decided April 5, 1909.

When parties have been fully heard in the regular course of judicial proceedings an erroneous decision does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment.

Where the Federal question is raised for the first time on the second appeal and the state court refuses to consider it, it comes too late.

Unless a decision upon the Federal question is necessary to the judgment, or was in fact made the ground of the judgment, this court has no jurisdiction to review the judgment of the state court.

Writ of error to review 80 Arkansas, 339, dismissed.

THE facts are stated in the opinion.

*Mr. James P. Clarke, Mr. Rufus J. Williams* and *Mr. J. R. Beasley,* for plaintiffs in error:

There can be no reasonable doubt of the existence of a Federal question in this case.

But whether there is a Federal question or not will be determined by this court for itself upon an examination of the record. *Freeland* v. *Williams,* 131 U. S. 405; *Davidson* v. *New Orleans,* 96 U. S. 97.

The Supreme Court of Arkansas having denied a constitutional right this court has jurisdiction to review the judgment. *Boyd* v. *Thayer,* 143 U. S. 135.

Raising the Federal question for the first time in the appellate state court, if it be there considered, or necessarily involved in the decision, gives the right of review in this court. *Railroad Co.* v. *Elliott,* 184 U. S. 530.

Plaintiff in error was denied due process of law both at law and in equity. Due process of law signifies a right to be heard

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in one's defense. *Hovey* v. *Elliott*, 167 U. S. 446; *Windsor* v. *McVeigh*, 93 U. S. 274; *R. R. Tax Cases*, 13 Fed. Rep. 722; *Galpin* v. *Page*, 18 Wall. 350.

In every judicial proceeding a fair trial is an indispensable element of due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97; *People* v. *Essex Co.*, 70 N. Y. 229.

If any question of fact or liability is conclusively presumed against the accused it is not due process of law. *Ziegler* v. *R. R. Co.*, 58 Alabama, 594; *Wilburn* v. *McCally*, 63 Alabama, 436.

Unless the party to be affected has an opportunity of being heard respecting the justice of the judgment sought it is not due process. *Railroad Tax Cases*, 13 Fed. Rep. 722.

No judgment of a court is due process of law if rendered without jurisdiction. *Scott* v. *McNeal*, 154 U. S. 34.

*Mr. John Gatling*, for defendants in error:

A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Hamlin* v. *Western Land Co.*, 147 U. S. 531. See also *Millinger* v. *Hartupee*, 6 Wall. 528; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79–87.

When parties have been fully heard, an erroneous decision of the state court does not amount to a lack of due process of law. *Central Land Co.* v. *Laidley*, 159 U. S. 112. See also *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Co.*, 113 U. S. 9, 26; *Morley* v. *Lake Shore R. R.*, 146 U. S. 162, 171; *Bergmann* v. *Backer*, 157 U. S. 655.

The record must show on what grounds the decision of the matter in which the Federal question is alleged to have been involved was made. *Caperton* v. *Bower*, 14 Wall. 216.

Even though a Federal question may have been raised and decided in the Supreme Court of the State, yet if so, it was not necessary to the decision of the cause, and therefore cannot avail here. *Capital Nat. Bank of Lincoln* v. *First Nat. Bank of Cadiz*, 172 U. S. 425; *Murdock* v. *Memphis*, 20 Wall. 635; *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Rut-*

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*land R. Co.* v. *Central Vermont R. Co.*, 159 U. S. 630; *Arkansas Southern Railroad Co.* v. *German National Bank*, 207 U. S. 270; *Hale* v. *Akers*, 132 U. S. 564; *Leathe* v. *Thomas*, 207 U. S. 93; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281.

All questions of fact are settled by the decision of the state court. *Hedrick* v. *Atchison R. R. Co.*, 167 U. S. 673; *S. C.*, 174 U. S. 96.

Not only the judgment but the evidence clearly shows that the plaintiffs in error were represented by counsel, so there was no want of due process or any fraud in the judgment. If it was erroneous, the remedy is by appeal.

The Federal question was raised too late. It was first suggested on the second appeal to the Supreme Court of the State, and then only on a motion to advance and affirm as a delay case. *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U. S. 110. See also *Bollin* v. *Nebraska*, 176 U. S. 83; *Citizens' Saving Bank* v. *Owensboro*, 173 U. S. 636.

The question cannot be raised in the petition for a writ of error if it had not already been raised in due time in the state court. *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S. 496; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Meyer* v. *Richmond*, 172 U. S. 82.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

In 1893 L. P. Featherstone qualified as administrator of the estate of Mary A. Cole, deceased, in the Probate Court of St. Francis County, Arkansas, with E. Bonner, one of the plaintiffs in error, as one of the sureties on his bond. In 1894, Featherstone, as administrator, filed his first settlement, and moved from Arkansas to Texas in 1895. Some time after he left the State, Henry P. Gorman, the defendant in error, was appointed by the Probate Court administrator in succession, and on February 1, 1898, he filed his first settlement, a second settlement in 1901, and in 1903 his third settlement. July 19, 1899, two

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of Featherstone's bondsmen, said E. Bonner and W. H. Coffey, appeared in the Probate Court in obedience to its order and filed the final settlement of Featherstone as administrator, in which there appeared to be a balance due to him of $23.57. To this settlement Gorman, administrator, and one of the heirs of the estate, appeared and filed exceptions. These exceptions were sustained by the Probate Court January 29, 1900, and a balance of $991.28 found due from Featherstone as administrator, and he was ordered to pay the same over to Gorman, as the administrator in succession. From this order and judgment of the Probate Court, Featherstone and his sureties, E. Bonner and Coffey, took an appeal to the Circuit Court, which appeal was dismissed by that court at the March term, 1901, for some informality as the state Supreme Court says.

February 12, 1900, suit was brought in the Circuit Court of St. Francis County by Gorman, administrator, against said Bonner and Coffey, to enforce the payment of the said judgment of $991.28. In this suit Bonner and Coffey filed an answer and a cross-complaint, to which Gorman, as administrator, filed a demurrer, which was sustained by the court, and judgment entered in favor of administrator Gorman against said sureties for $991.28. From this judgment the sureties appealed to the state Supreme Court, where it was affirmed October 10, 1903. *Bonner* v. *Gorman*, 71 Arkansas, 480.

The court ruled, as sufficiently stated in the headnote, that "in a suit against the sureties of an administrator to recover the amount that had been adjudged by the Probate Court to be due by him to the estate, it is no defense that the Probate Court erred in finding that any amount was due by such administrator, as the error should have been corrected on appeal."

To restrain the enforcement of this judgment, E. Bonner filed a bill in the Chancery Court of St. Francis County, Arkansas, at the December term, 1903. To this bill administrator Gorman and the heirs filed a demurrer on May 9, 1904, which was overruled by the court, and they then filed an answer.

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The Chancery Court rendered a decree in favor of plaintiff E. Bonner, enjoining Gorman, as administrator, and the heirs at law of Mary A. Cole, from executing that judgment. From this decree Gorman and the heirs at law appealed to the state Supreme Court, where it was, on October 22, 1906, reversed, annulled and set aside, and the cause remanded to the Chancery Court, with directions to dismiss the complaint for want of equity. *Gorman* v. *Bonner*, 80 Arkansas, 339.

The rulings of the court were that "under the code a defendant cannot permit judgment to go against him upon a legal liability, and then enjoin the judgment in equity upon equitable grounds known before the judgment at law was rendered; a judgment of the Circuit Court against an administrator and his bondsmen will not be enjoined in equity on the ground that it was based on a void or fraudulent probate judgment, as that was matter of defense which might have been pleaded in the Circuit Court." The court also added that "it is not alleged or shown that there was any fraud in the procurement of the judgment at law, and we see no valid reason why it should be enjoined."

At the December term, 1906, of the Chancery Court a decree was entered upon, and in accordance with, the mandate of the Supreme Court, whereupon the said E. Bonner and E. L. Bonner, the latter being the surety on the injunction bond, prayed an appeal to the Supreme Court, which was granted. Gorman, administrator, and others, then appellees, filed a motion to advance this appeal and affirm the case as a delay case, and the Supreme Court granted the motion to advance and affirmed the decree. The Supreme Court rendered a *per curiam* opinion, which is to be found in *Bonner* v. *Gorman*, 101 S. W. Rep. 1153. This memorandum stated that "The only question in the case is whether the decree is in conformity to the mandate of this court. The record has been carefully looked into and the decree found to be in strict accord with the mandate and opinion of the court and there is nothing new for consideration. Ordinarily this would stamp this case as a delay case and it should

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be advanced and affirmed and under the practice in such cases the ten per cent penalty would be added. But it is evident from the record that the appellant has brought this case here in order to seek a writ of error to the Supreme Court of the United States. It will be with the Chief Justice to decide whether there is a Federal question herein, but when a case is manifestly brought here in good faith to obtain a review in the Federal Supreme Court, although there is nothing in it for this court to consider, yet such object prevents it being the class of cases where the penalty should be inflicted."

A writ of error from this court was allowed May 9, 1907, the petition for the writ containing an assignment of errors, of which one was that the judgment of the Probate Court was null and void, and all other judgments based upon it were void also, so that the Bonners, appellants, by their enforcement, were deprived of their property without due process of law, in violation of the Fourteenth Amendment. The record was filed here June 3, 1907, and the case submitted February 23, 1909.

No Federal question was raised in this case prior to the trial and judgment on the merits. The only suggestion that such a question was involved was put forward after the state Supreme Court had affirmed on the second appeal the judgment rendered by the Circuit Court in strict obedience to its mandate. Compliance with the mandate was in fact the only question open to and determined by the higher court.

It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States, *Central Land Company* v. *Laidley*, 159 U. S. 103, 112, and, that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late. *Union Mutual Life Insurance Company* v. *Kirchoff*, 169 U. S. 103, 110. And see *Sayward* v. *Denny*, 158 U. S. 180; *Mut. L. Ins. Co.* v. *McGrew*, 188 U. S. 291, 308. Moreover, "according to the well-

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settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed." *Arkansas Southern Railroad Company* v. *German National Bank*, 207 U. S. 270; *California Powder Works* v. *Davis*, 151 U. S. 389; *St. L., I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281.

*Writ of error dismissed.*

## UNITED STATES *v.* DICKINSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 362. Argued January 4, 5, 1909.—Decided April 5, 1909.

The writ of certiorari cannot be granted under the act of March 3, 1891, c. 517, 26 Stat. 826, in a criminal case at the instance of the United States whatever the supposed importance of the questions involved. *United States* v. *Sanges*, 144 U. S. 310, distinguished.

The power of this court to issue the writ of certiorari under § 14 of the Judiciary Act of 1789, now § 716, Rev. Stat., is not a grant of appellate jurisdiction to review for correction of mere error.

The act of March 2, 1907, c. 2564, 34 Stat. 1246, giving an appeal to the Government in certain criminal cases cannot be extended beyond its terms, or construed so as to extend the power of certiorari under the act of March 3, 1891, c. 517, 26 Stat. 826, to bring up a criminal case for the correction of mere error at the instance of the United States.

Certiorari to review 159 Fed. Rep. 801, dismissed.

THE facts are stated in the opinion.

*The Attorney General* and *Mr. Asa P. French*, with whom *The Solicitor General* was on the brief, for petitioner:

This court has power under the Judiciary Act of 1789, "to

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issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," and that includes the right to issue writs of certiorari in all proper cases. *In re Chetwood*, 165 U. S. 443, 462.

The writ of certiorari, under the Federal Constitution and statutes, is strictly the common law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence.

At common law the writ might be granted at the instance of either the prosecutor or the defendant; it was always granted at the request of the king, in whose name the justice of the people was invoked. 4 Blackstone's Commentaries, 321. Certiorari lies in all judicial proceedings in which a writ of error does not lie. *Groenvelt* v. *Burwell*, 1 Ld. Raym. 454.

By anology the enforcement of the law by the people in the name of the king is the same as its enforcement by the people in the name of the United States, and there is ancient authority in support of granting this writ by this court. The part taken in these proceedings by the United States is entirely in accord with the usages and principles of the common law, as referred to in the act of 1789.

The case at bar is within the appellate jurisdiction of this court. Section 5 of the act of March 3, 1891, provides that such a case involving the construction or application of the Constitution of the United States may be brought here on appeal or writ of error.

Under a proper construction of the act of March 3, 1891, this court may take away from the final determination of any Circuit Court of Appeals, at any stage, before or after decision rendered in that court, any case involving questions of gravity and general importance, or as to which there is conflict between the decisions of state and Federal courts, or between those of Federal courts in different circuits, and indeed involving any matter of special interest to the people. *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 515; *Fields* v. *United States*, 205 U. S. 296;

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*American Construction Co.* v. *Jacksonville &c. Ry. Co.*, 148 U. S. 383, 384. This court has the same right to review a criminal case on certiorari on the application of the Government that it has to review a civil case.

Congress has power upon the establishment of an inferior tribunal, to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari. *Taylor* v. *United States*, 207 U. S. 120, 127; *United States* v. *Bitty*, 208 U. S. 393, 399, 400.

While it was held in *United States* v. *Sanges*, 144 U. S. 310, 323, that § 5 of the act of March 3, 1891, was not sufficiently specific to give to the United States the right to sue out a writ of error to review a judgment of a Circuit Court sustaining a demurrer in a criminal case in which that court held certain Federal statutes to be unconstitutional, the case at bar presents a different situation under a different provision of law. The Government is now merely asking that this court shall, under the jurisdiction reserved to it by § 6 of the act, order a case of which a Circuit Court of Appeals has otherwise final jurisdiction to be brought here from such court on certiorari, and determine it in the same manner as if it were here on appeal or writ of error.

The jurisdiction of this court to review on certiorari cases within the final jurisdiction of a Circuit Court of Appeals and pending in that court extends to all cases which are of sufficient gravity and importance to make their decision by this court imperative or desirable, including a criminal case, like that at bar.

*Mr. Henry W. Dunn*, with whom *Mr. Samuel L. Powers* was on the brief, for respondent:

While this court, under § 716, Rev. Stat., and independently of the act of March 3, 1891, may issue writs of certiorari in proper cases, when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice, *Ex parte Chetwood*, 165 U. S. 443, this is not a proper one for the exercise of that extraor-

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dinary power. The question of jurisdiction must be decided by construction of the provisions of the act of 1891. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 380.

While any limitation in the matter of direct appeals under § 5 of the act of March 3, 1891, in respect to criminal cases must be read into the statute wholly by implication, nevertheless the right of review given by that section, so far as it relates to criminal cases, must be limited to review at the instance of the defendant, after a decision in favor of the Government. It could not be fairly inferred that Congress intended to authorize a review in a criminal case of a decision in favor of the accused. *United States* v. *Sanges*, 144 U. S. 310. It cannot be doubted that under the authority of that case, and on the same grounds, the general provision of § 6 granting appellate jurisdiction to the Circuit Court of Appeals, should be held subject to the same limitation.

The intent of Congress as expressed in the act of 1891 must be judged without any reference to the recent attempts to strengthen the arm of the Government, in certain classes of prosecutions. Such conditions have found natural expression in such recent legislation as the act of Congress which was before this court in *Taylor* v. *United States*, 207 U. S. 120, and *United States* v. *Bitty*, 208 U. S. 393.

This court has no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. *Cross* v. *United States*, 145 U. S. 571, 574.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Dickinson and one Foster were jointly indicted under § 5209 of the Revised Statutes of the United States, which is a part

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of the National Bank Act. Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with willfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error from the Circuit Court of Appeals for the First Circuit, and after argument that court held his conviction invalid by reason of the fact that the verdict against him was found by a jury of only ten men. 159 Fed. Rep. 801. On a writ of certiorari issued on petition of the United States the case was brought to this court.

It appeared in the course of the trial that one of the jurors by reason of illness was unable to sit further, whereupon the following agreement, signed by the parties, was filed of record:

"Whereas, one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged."

The court then proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him.

The trial proceeded with the remaining ten jurors, who returned a verdict of guilty, and thereupon a motion in arrest of judgment was filed as follows:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12)

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jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict."

This motion was overruled, and a bill of exceptions to the ruling was duly allowed on the same day, and defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham.

The judgment of the Circuit Court of Appeals was—

"The judgment of the District Court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law."

Application was then made to this court for a writ of certiorari, which, because of the urgency of the Government as to the importance of the particular decision, was granted, notwithstanding the judgment of the Circuit Court of Appeals was not final.

Nevertheless, we are met at the threshold by the objection that the writ of certiorari cannot be granted under the act of 1891 in a criminal case, whatever the supposed importance of the question involved.

In our opinion it is clear that the question of jurisdiction must be decided by the proper construction of the act of March 3, 1891. That act (March 3, 1891, c. 517, 26 Stat. 826) was framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, and assigned to the Circuit Courts of Appeals thereby established a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372.

Section 6 reads as follows:

"The Circuit Courts of Appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the



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jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And, thereupon, the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And exceping also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

At the time when this act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court, under §§ 651 and 697 of the Revised Statutes. In capital cases, by the act of February 6, 1889, 25 Stat. 656, c. 113, § 6, the defendant was given the right to obtain a review in this court by writ of error. The act of 1891 superseded the existing statutory provisions as to a certificate of difference of opinion. *United States* v. *Rider*, 163 U. S. 132; *The Paquete Habana*, 175 U. S. 677.

By clause 5, appeals or writs of error from the District and

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Circuit Courts direct to the Supreme Court might be taken in cases involving the construction or application of the Constitution of the United States, or where the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, and in cases in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States.

The clauses as to appeals or writs of error where constitutional questions were involved made no distinction in their language between civil and criminal cases, and no distinction as to the party who was aggrieved by the decision in the court below; but in *United States* v. *Sanges*, 144 U. S. 310 (decided April 4, 1892), it was held, on great consideration, that the right of review given by that provision of § 5, so far as it related to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. The decision was reached after a thorough examination of the Federal legislation as to appellate jurisdiction in criminal cases and of the authorities in England and in the United States relating to criminal appeals, in which the court finds no precedent without express statutory enactment for any review of any judgment in favor of the accused. And the case proceeded upon the grounds thus summed up in the concluding paragraph of the opinion:

"In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

As we have before observed, the certiorari in this case is the certiorari provided for by the act of 1891, being in the nature of an appeal or writ of error for the mere correction of error, a new use of the writ.

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Section 14 of the Judiciary Act of 1789 gave to the Supreme Court and the Circuit and District Courts "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," but that was not a grant to this court of appellate jurisdiction to review by certiorari for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable.

In *United States* v. *More*, 3 Cranch, 159, 172, Mr. Chief Justice Marshall said:

"In support of the jurisdiction of the court, the attorney general has adverted to the words of the Constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of 'all cases in law and equity arising under the laws of the United States,' and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on originally, 'with such exceptions, and under such regulations, as the Congress shall make,' that the Supreme Court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

"This argument would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no Congressional regulation or exception on the subject.

"But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." *Ex parte Yarbrough*, 110 U. S. 651, 653;

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*Cross* v. *United States*, 145 U. S. 571, 574. In the latter case we said:

"We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language."

The decisions to that effect are very numerous and it is quite inadmissible to hold that criminal cases cannot be reviewed here by writ of error or appeal without express statutory authority, but may be by certiorari under Revised Statutes, § 716, for the correction of any error that may have been committed by the lower courts; and our decisions are to the contrary.

In *Ex parte Gordon*, 1 Bl. 503, it was ruled that neither a writ of error, a writ of prohibition, nor certiorari, would lie from the Supreme Court to a Circuit Court of the United States in a criminal case, and that the only case in which the court was authorized even to express an opinion on the proceedings in a Circuit Court in a criminal case was where the judges of the Circuit Court were opposed in opinion upon a question arising at the trial and certified it to this court for its decision.

It is true that in the case of *Chetwood*, 165 U. S. 443, 462, we allowed the writ to bring up for review certain final orders of the Circuit Court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of an inherent general power under the Constitution did not arise. *In re Tampa Suburban R. R. Co.*, 168 U. S. 583.

And in *Whitney* v. *Dick*, 202 U. S. 132, it was said that the power of the court to issue original and independent writs of certiorari might be upheld under the authority given by § 716, citing *Ex parte Vallandigham*, 1 Wall. 243, and cases; *Ewing* v. *St. Louis*, 5 Wall. 413; *Ex parte Lange*, 18 Wall. 163; and quoting from the opinion of Mr. Justice Gray in *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, where an

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application was made for mandamus and certiorari, as follows:

"Under this provision, the court might doubtless issue writs of certiorari in proper cases. But the writ of certiorari has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341."

But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error.

The construction of the act of 1891, must be arrived at without reference to such recent legislation as the act of Congress of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error in certain instances in criminal cases, in respect of which this court held in *United States* v. *Keitel*, 211 U. S. 398, "that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor

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of the United States is limited by the very terms of the statute to authority to reëxamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.

*Writ of certiorari dismissed.*

MR. JUSTICE MOODY took no part in the consideration and disposition of this case.

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## HEPNER v. UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 626. Argued March 2, 1909.—Decided April 5, 1909.

A penalty may be recovered by a civil action, although such an action may be so far criminal in its nature that the defendant cannot be compelled to testify against himself therein in respect to any matter involving his being guilty of a criminal offense.

A suit brought by the United States to recover the penalty prescribed by §§ 4 and 5 of the Alien Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, is a civil suit and not a criminal prosecution, and when it appears by undisputed testimony that a defendant has committed an offense against those sections the trial judge may direct a verdict in favor of the Government.

THE facts, which involve the right of a trial judge to direct a verdict in favor of the Government in an action for penalty

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for violation of the Alien Immigration Law, are stated in the opinion.

*Mr. S. P. McConnell*, for William Hepner, submitted.

*Mr. Assistant Attorney General Ellis*, with whom *Mr. Edwin P. Grosvenor* was on the brief, for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action of debt was brought by the United States to recover a penalty under the statute of Congress of March 3, 1903, regulating the immigration of aliens into this country. 32 Stat. 1213, 1214, c. 1012. The case is now before this court upon a question certified by the judges of the Circuit Court of Appeals under the authority of § 6 of the Judiciary Act of March 3, 1891. 26 Stat. 826, c. 517.

Sections 4 and 5 of the act of 1903, are as follows:

"SEC. 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.

"SEC. 5. That for every violation of any of the provisions of section four of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parole or special, to or with such alien shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action there-

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for in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

In the present action there was a judgment for the United States against the defendant Hepner for the prescribed penalty of one thousand dollars. It is certified by the judges of the Circuit Court of Appeals, to which the case was taken upon writ of error, that the testimony showed that an alien was induced by an offer, solicitation, or promise of the defendant to migrate to the United States for the purpose of performing labor here.

The question propounded to this court by the judges of the Circuit Court of Appeals is: "When it appears by *undisputed* testimony that a defendant has committed an offense against secs. 4 and 5 of the act of March 3, 1903, may the trial judge *direct* a verdict *in favor of* the Government, plaintiff, which has sued for the $1,000 forfeited by such offense under said section 5?"

Is this to be deemed as, in all substantial respects, a civil suit as distinguished from a strictly criminal case or criminal prosecution? This must be first determined before answering the specific question propounded by the judges below. It is well to look at some of the adjudications in suits for statutory penalties.

In *Stockwell* v. *United States*, 13 Wall. 531, 542, 543—which was an action of debt brought by the United States to recover forfeitures and penalties incurred under the act of Congress of March 3, 1823, 3 Stat. 781, c. 58, relating to the entry of merchandise imported into the United States from any adjacent territory—the question arose whether a civil action could be maintained by the Government. That act provided, among

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other things, that any one receiving, concealing, or buying goods, wares or merchandise, knowing them to have been illegally imported and liable to seizure, "shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so received, concealed, or purchased." The defendant in that case insisted that the Government could not proceed by a civil suit to recover the penalty specified in the statute—based, as that penalty was, on an offense against law—except by indictment or information. The court rejected that view, and, speaking by Mr. Justice Strong, said: "No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 fixes the amount of the liability at double the value of the goods received, concealed, or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability, is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action. But all doubts respecting the matter are set at rest by the fourth section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed, and accounted for in the manner prescribed by the act of March 2, 1799, entitled 'An act to regulate the collection of duties on imports and tonnage.' By referring to § 89 of that act, March 2, 1799, c. 22, 1 Stat. 627, 695, it will be seen that it directs all penalties, accruing by any breach of the act, to be sued for and recovered, with costs of suit, in the name of the United States

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of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have been incurred, is enjoined to cause *suits* for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no *action* or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has frequently been ruled that debt will lie, at the suit of the United States, to recover the penalties and forfeitures imposed by statutes. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed, or purchased, with knowledge that they had been illegally imported, 'on conviction thereof.' It may be, therefore, that an indictment or information might be sustained. But the question now is, whether a civil action can be brought, and, in view of the provision that all penalties and forfeitures incurred by force of the act shall 'be sued for and recovered,' as prescribed by the act of 1799, we are of opinion that debt is maintainable. The expression, 'sued for and recovered' is primarily applicable to civil actions, and not to those of a criminal nature."

In *Jacob* v. *United States*, 1 Brock. 520, 525, the question arose whether the United States could maintain an action of debt to recover the specific sum which an act of Congress (December 21, 1814, c. 15, 3 Stat. 152, 155), providing for additional revenue declared should be forfeited and paid by any person guilty of the offense of forcibly rescuing or causing to be arrested, any spirits, etc., after the same had been seized by the collector. Chief Justice Marshall held that an action of that kind was a "civil cause" (September 24, 1789, c. 20 p. 73, 1 Stat. 73, 76), within the meaning of the ninth section of the Judiciary Act of 1789, defining the jurisdiction of the District Courts of the United States. In *Stearns* v. *United States*, 2 Paine, 300, Mr. Justice Thompson, in the Circuit Court of the United States for the District of Vermont, held that actions

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for penalties were civil actions, both in form and in substance—citing 3 Blackstone's Com. 158, and *Atcheson* v. *Everitt*, 1 Cowp. 382, 391. In the latter case, which was an action of debt, based upon an English statute, Lord Mansfield said that a penal action "is as much a civil action as an action for money had and received." A similar ruling was made by Mr. Justice Iredell in *United States* v. *Mundell*, 1 Hughes, 415, 423 (6 Call, 245, 253), which was an action of debt by the United States to recover a penalty prescribed by an act of Congress. The court said: "It is scarcely necessary to stop here to observe, that the proceeding in question was not a proceeding in a criminal case within the meaning of the provisions of Congress, but was in truth a civil suit, though for an act of disobedience for which a criminal prosecution might possibly have been commenced, if the act of Congress does not expressly, or impliedly, exclude it; a point not now material to consider, because the civil suit has, in this instance, been in fact adopted. A criminal proceeding, unquestionably, can only be by indictment, or information. The proceeding in question was neither." Similar views as to the civil nature of actions for penalties were expressed in *United States* v. *Younger*, 92 Fed. Rep. 672; *United States* v. *B. & O. S. W. R. Co.*, 159 Fed. Rep. 33, 38; *Hawlowetz* v. *Kass*, 23 Blatch. 395. See, also, *Chaffee & Co.* v. *United States*, 18 Wall. 516, 538; *Wilson* v. *Rastall*, 4 Term, 753; *Roberge* v. *Burnham*, 124 Massachusetts 277, 279; *People* v. *Briggs*, 114 N. Y. 56, 64, 65; *Mitchell* v. *State*, 12 Nebraska, 538, 540; *Webster* v. *People*, 14 Illinois, 365, 367; *Hitchcock* v. *Munger*, 15 N. H. 97, 103, 134; *State* v. *Brown*, 16 Connecticut, 54, 59.

It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted. *United States* v. *Claflin*, 97 U. S. 546. But there can be no

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doubt that the words of the statute on which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty. It provides that the penalty of one thousand dollars may be "sued for" and recovered by the United States or by any "person" who shall first bring his "action" therefor "in his own name and for his own benefit," " as debts of like amount are now recovered in the courts of the United States;" and "separate suits" may be brought for each alien thus promised labor or service of any kind. The district attorney is required to prosecute every such "suit" when brought by the United States. These references in the statute to the proceeding for recovering the penalty plainly indicate that a civil action is an appropriate mode of proceeding.

A case to which attention is called by both sides is *United States* v. *Zucker*, 161 U. S. 475, 481. What was that case? It makes, we think, for the Government rather than the defendant; for, that was a *civil* action to recover from the defendants a certain sum as the value of merchandise originally belonging to them and alleged to have been forfeited to the United States under the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, 135. That act provided in reference to merchandise entered by means of fraudulent or false invoices, etc., that " such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, . . . and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court." § 9. At the trial, the Government offered in evidence, against the defendants, a deposition taken in Paris, properly authenticated. It was not objected, in that case, that a civil action could not be brought by the Government to recover the penalty prescribed. The question considered was whether a deposition of an absent witness could be used against the objection of the defendants, who insisted that the action, although civil in form, was, in substance, a criminal case, and that they

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were, for that reason, entitled, under the Sixth Amendment of the Constitution, to be confronted, in court, with the witnesses against them. The objection was sustained by the trial court, but this court, upon writ of error sued out by the United States, held that that Amendment related to a prosecution of an accused that was technically criminal in its nature. The court said: "The words in the Sixth Amendment, 'to be informed of the nature and cause of the accusation,' obviously refer to a person accused of crime, whether a felony or misdemeanor for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled 'to be confronted with the witnesses against him,' has no reference to any proceeding (although the evidence therein may disclose, of a necessity, the commission of a public offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the Sixth Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime." Again: "An action, in which a judgment for money only is sought, even, if in some aspects it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction."

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Two things, then, appear from the *Zucker case:* 1. That it recognized an action to recover a penalty to be a civil action, and a proper mode of procedure. 2. That in such an action the defendant was not entitled, by virtue of the Constitution, to be confronted in court with the witnesses against him. No such question as the last one arises in this case. But the decision in the *Zucker case* is important in that it recognizes the right of the Government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense. It is important also in that it decides that an action of that kind is not of such a criminal nature as to preclude the Government from establishing, according to the practice in strictly civil cases, its right to a judgment by depositions taken in the usual form, without confronting the defendant with the witnesses against him.

The defendant insists that the case of *Lees* v. *United States,* 150 U. S. 476, 480, is an authority in his favor. This view cannot be sustained. That case was a civil action to recover a penalty for importing an alien into the United States to perform labor, in violation of the act of February 26, 1885. 23 Stat. 332, c. 164. In that case the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This court held that that could not be done, saying that "this, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself," meaning thereby only that the action was not of such a criminal nature as to prevent the use of depositions. Among the authorities cited in the *Lees case* was *Boyd* v. *United States,* 116 U. S. 616, 634. In the latter case it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such a *quasi*-criminal nature that they come within the reason of criminal proceedings for the purposes of the Fourth Amendment of the Constitution and of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.

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So that the *Lees* and *Boyd cases* do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense. Those cases do not negative the proposition that the court may direct a verdict for the plaintiff in a civil action to recover statutory penalties or forfeitures, if the evidence is "undisputed" that the defendant by his acts incurred the penalty for the offense out of which the civil cause of action arises. That proposition has the support both of reason and authority. Certainly, if the evidence in this case, beyond all dispute, showed that the *plaintiff* was *not* entitled to judgment, then the duty of the court would have been to direct a verdict for the defendant. The general rule on that point is thus stated in *Pleasants* v. *Fant*, 22 Wall. 116, 122: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor, that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insuffiicient to warrant a verdict for the plaintiff, the court should say so to the jury." This rule has been often approved by this court, and is steadily

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enforced in the courts of the United States. The same rule must obtain as to the duty of the court, when the undisputed testimony shows that the defense is without any foundation upon which to rest, and that the plaintiff is undisputably entitled, upon the facts and as matter of law, to a judgment. In *Herbert* v. *Butler*, 97 U. S. 319, 320, this court, referring to *Improvement Company* v. *Munson*, 14 Wall. 442, and *Pleasants* v. *Fant*, above cited, and speaking by Mr. Justice Bradley, said: " . . . that although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render." In *Bowditch* v. *Boston*, 101 U. S. 16, 18, the court said: "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." In *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241, the court, referring to *Herbert* v. *Butler*, above cited, and other cases, said: "It is true that, in the above cases, the verdict was directed for the defendant. But where the question, after all the evidence is in, is one entirely of law, a verdict may, at the trial, be directed for the plaintiff, and where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment."

True, the cases just cited were purely civil in their nature, and there is in the present case no bill of exceptions, disclosing the evidence adduced at the trial, but we have something here more specific—a certified question which, in effect, requires the



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court to assume, as the basis of any answer to the question, that, according to the undisputed testimony, the Government proved the alleged violation of law. In such a case there are no facts for the jury to consider. Whether, under the undisputed testimony, the plaintiff was entitled to judgment was manifestly only a question of law, in respect of which it was the duty of the jury to follow the direction of the court. Even in technical criminal cases it is the duty of the jury to accept the law as declared by the court. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 101, *and cases there cited.* If in a civil action to recover a penalty the defendant is entitled, the evidence being undisputed, to have a peremptory instruction in his behalf, it is difficult to perceive why the Government is not entitled to a peremptory instruction in its favor, where the undisputed testimony left no facts for the jury to consider, but established, beyond all question and as matter of law, its right to judgment for the prescribed penalty. In *Four Packages* v. *United States*, 97 U. S. 404, 412, which was a proceeding for the forfeiture of goods because of their having been taken from the steamer bringing them into the country, without a permit from the collector, the jury was directed to find a verdict for the Government. 1 Stat. 665; Gen. Reg. (1857) 145. That ruling being assigned for error, this court said: "Taken as a whole, the evidence fully proved that the packages were unladen and delivered without the permit required by the act of Congress; and inasmuch as there was no opposing testimony, the direction of the court to the jury to return a verdict for the plaintiffs was entirely correct"—citing *Improvement Company* v. *Munson*, 14 Wall. 442; *Ryder* v. *Wombwell*, Law Rep. 4 Ex. 39; Law Rep., 2 P. C. 235. In *United States* v. *Thompson*, 41 Fed. Rep. 28, which was an action to recover a penalty of $1,000 under the contract labor law, the court directed a verdict, saying: "There certainly is no question here for the jury, as there is no conflict of testimony. . . . I shall therefore direct a verdict for the Government for the full amount, $1,000." See also *Hines* v. *Darling*, 99 Michigan, 47.

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The objection made in behalf of the defendant, that an affirmative answer to the question certified could be used so as to destroy the constitutional right of trial by jury, is without merit and need not be discussed. The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law.

Restricting our decision to civil cases, in which the testimony is undisputed, and without qualifying former decisions requiring the court to send a case to the jury, under proper instructions as to the law, where the evidence is conflicting on any essential point, we answer the question here certified in the affirmative. Let this answer be certified to the court below.

MR. JUSTICE BREWER dissents.

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## UNITED STATES v. MASON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 642. Argued March 5, 1909.—Decided April 5, 1909.

On an appeal taken in a criminal case by the United States under the act of March 2, 1907, c. 2564, 34 Stat. 1246, from the ruling of the Circuit Court sustaining a special plea in bar, this court is limited in its review to that ruling and cannot consider other grounds of demurrer to the indictment. *United States* v. *Keitel*, 211 U. S. 370, 398.

Section 5509, Rev. Stat., does not embrace any felony or misdemeanor against a State of which, prior to the trial in Federal court of the Federal offense the defendants had been lawfully acquitted by a state court having full jurisdiction.

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As the Federal court accepts the judgment of a state court construing the meaning and scope of a state enactment, whether civil or criminal, it should also accept the judgment of a state court based on the verdict of acquittal of a crime against the State.

THE facts, which involve the construction of §§ 5508 and 5509, Rev. Stat., are stated in the opinion.

*Mr. Assistant Attorney General Fowler*, for plaintiff in error:

The facts presented in the special plea do not bring the case within the second jeopardy provision of the Fifth Amendment. This provision applies only to proceedings in United States courts. The first ten Amendments operate on the National Government alone. *Barron* v. *Baltimore*, 7 Pet. 242, 246; *Livingston* v. *Moore*, 7 Pet. 468, 551; *Fox* v. *Ohio*, 5 How. 410, 434; *Smith* v. *Maryland*, 18 How. 71, 76; *Withers* v. *Buckley*, 20 How. 84, 91; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479; *Twitchell* v. *The Commonwealth*, 7 Wall. 321, 325; *The Justices* v. *Murray*, 9 Wall. 274, 278; *Edwards* v. *Elliott*, 21 Wall. 532, 557; *Walker* v. *Sauvinet*, 92 U. S. 90, 92; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Davidson* v. *New Orleans*, 96 U. S. 97, 101; *Kelly* v. *Pittsburg*, 104 U. S. 78, 79; *Presser* v. *Illinois*, 116 U. S. 252, 265; *Spies* v. *Illinois*, 123 U. S. 131, 166; *Brown* v. *New Jersey*, 175 U. S. 162, 174; *Barrington* v. *Missouri*, 205 U. S. 486; *Hunter* v. *Pittsburg*, 207 U. S. 176.

The fact that this case is pending in a Federal court does not make the provision applicable, as the pleas do not set up a former jeopardy within the meaning of the Constitution. The legislative and judicial acts of the state governments are entirely distinct from similar acts of the National Government, and this Amendment does not apply to any proceeding in a state court. *Barron* v. *Baltimore*, 7 Pet. 242, 246. See also *Fox* v. *Ohio*, 5 How. 410, 434; *United States* v. *Barnhart*, 22 Fed. Rep. 285, 290; 12 Cyc. Law and Pro. 259.

The same act may constitute an offense against both the national and state governments and the trial of one offense is

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not a bar to the trial of the other. *Fox* v. *Ohio*, 5 How. 410, 434, *Moore* v. *People of Illinois*, 14 How. 13, 19; *United States* v. *Cruikshank*, 92 U. S. 542, 550; *Coleman* v. *Tennessee*, 97 U. S. 509, 518; *Ex parte Siebold*, 100 U. S. 371, 390; *Cross* v. *North Carolina*, 132 U. S. 131, 139; *Pettibone* v. *United States*, 148 U. S. 197, 209; *Crossley* v. *California*, 168 U. S. 640, 641; *Grafton* v. *United States*, 206 U. S. 333, 353; *Sexton* v. *California*, 189 U. S. 319.

The offense with which defendants are charged does not arise out of the same acts as, and is entirely different in its nature from, the offense for which they were tried in the state court.

Defendants are not in this case indicted for the murder of Walker, but for a conspiracy to injure and intimidate and oppress Walker and others in the exercise of certain privileges secured to them by the Constitution and laws of the United States. The gravamen of the offense here charged is the conspiracy. Rev. Stat., § 5509, does not create a separate offense, but it only prescribes the punishment that may be inflicted in case it be determined by the jury that the aggravated conditions mentioned therein existed. As to the relationship between § 5508 and § 5509 and the object of the latter section, see *Davis* v. *United States*, 107 Fed. Rep. 755. See also *Rakes* v. *United States*, 212 U. S. 55; *Motes* v. *United States*, 178 U. S. 462.

*Mr. John M. Waldron*, with whom *Mr. Reese McCloskey* and *Mr. N. W. Dixon* were on the brief, for defendants in error:

The spirit, if not the letter, of the second jeopardy clause of the Fifth Amendment inhibits a retrial in the Federal court of the murder charge contained in the indictment. Constitutional provisions for the protection of person and property should be liberally construed. *Boyd* v. *United States*, 116 U. S. 635; *Ex parte Lange*, 18 Wall. 163, 205.

For cases holding, on a similar state of facts, that the right of retrial herein does not exist, see *Houston* v. *Moore*, 5 Wheat. 1; *United States* v. *Pirates*, 5 Wheat. 184, 197. See also 1 Kent's

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Commentaries, 188; 1 Bishop's Crim. Law (6th Ed.), §§ 985, 984, 1060; 1 Wharton's Crim. Law, § 293; *In re Stubbs*, 133 Fed. Rep. 1012.

There are several decisions of the state supreme courts which refuse to recognize a concurrent jurisdiction. The bare possibility of a second prosecution for the same alleged criminal act is abhorrent to the principles of the common law, as well as the genius and spirit of American jurisprudence, and dual jurisdiction of state and Federal government to create offenses against each out of one act should be denied. See *Commonwealth* v. *Ketner*, 92 Pa. St. 372, 377; *Com.* v. *Fuller*, 8 Metcalf, 313 (Mass.); *Harlan* v. *People*, 1 Douglas' Reports (Mich.), 212.

These constitutional provisions here relied on are, in effect, but declaratory of the maxims and principles of the common law, and the humane principles represented thereby should be applied and enforced by the Federal courts, even though the Federal Constitution was silent upon the subject. *Ex parte Lange*, 18 Wall. 163–205; see also *State* v. *Cooper*, 1 Green (N. J.), 375; 1 Chitty's Crim. Law, §§ 452–462.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal prosecution under §§ 5508 and 5509 of the Revised Statutes. The substantial provisions of each of those sections were reproduced from the act of May 31st, 1870, c. 114, passed for the purpose of enforcing the right of citizens to vote in the several States, and for other purposes.

Those sections are as follows: "§ 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not

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more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States. § 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed." Section 5507 prescribes a different offense from that specified in § 5508, has no bearing on the present case, and need not therefore be given here.

The first count of the indictment—stating it generally—charged the defendants with an unlawful, malicious and felonious conspiracy to injure, oppress, threaten and intimidate certain named persons, citizens of the United States, in the free exercise and enjoyment of a right and privilege secured to them and to each of them by the Constitution and laws of the United States, in this, that the said conspirators injured, oppressed, threatened and intimidated those citizens, in the free exercise and enjoyment of their right and privilege as special agents and employés of the Department of Justice and as citizens and agents of the United States, to investigate, discover, inform of, and report to the proper officer all violations of the laws of the United States and the evidence relating thereto, in the matter of the fraudulent and unlawful entry of coal and other public lands of the United States in Colorado, theretofore subject to entry under the laws of the United States. It was further charged in the same count that in pursuance of such unlawful and felonious conspiracy *and to effect the object thereof*, the defendants, within the District of Colorado, did kill and murder one Joseph A. Walker.

The second count differs from the first only in the particular that it charges that the alleged conspiracy and murder was because of the persons against whom the conspiracy was formed *having freely exercised* the right and privilege specified in the first count.

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The third count charges substantially the commission of the same offense of conspiracy and murder, because of the exercise by the citizens named of the right and privilege secured to them by the Constitution and laws of the United States to accept public employment from and to enter the service of the United States as officers, agents and employés, and to be secure in their persons from bodily harm, injury and cruelties, while discharging the duties belonging to them as such officers, agents and employés.

It was stipulated by the parties that the defendants might file a demurrer to the indictment and to each count thereof, as well as "a plea in bar in the nature of a plea of former acquittal" to so much of each count as charged them with the crime of having killed and murdered one Walker, named in the indictment—the stipulation reciting, "said charge of murder being based upon § 5509 of the Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer."

The court made an order of record recognizing and giving effect to the above stipulation. The defendants filed a joint and several demurrer assailing the sufficiency of each count of the indictment. In view of the state of the record and of the conclusions reached by the court we need not set out at large the various grounds of that demurrer.

The defendants filed special pleas in bar of so much of each count of the indictment as charged that the defendants, *in the act of* violating § 5508, killed and murdered Walker for the purpose of giving effect to the alleged conspiracy. To each special plea the Government filed a demurrer.

The special pleas charged in substance that theretofore, in a named court of Colorado, the defendants were charged with the commission of the same murder as that referred to in the indictment herein; that they were arrested and tried in that court (which had full jurisdiction to try the offense charged) and were duly and regularly acquitted of the above charge

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of murder and discharged from custody. This acquittal was pleaded as a bar to so much of the indictment in the present conspiracy case in the Federal court as sought to enforce, notwithstanding the acquittal of the defendants in the state court, the provisions of § 5509 of the Revised Statutes.

The court below overruled the demurrer to the indictment and adjudged each plea in bar to be sufficient. The Government electing to stand by its demurrer to the special pleas, the Circuit Court of the United States, by an order to that effect, discharged the defendants from that part of each count in the indictment which related to the charge of their having murdered Walker, in violation of the laws of the State, in the act of committing the alleged conspiracy in violation of the statute of the United States.

The United States thereupon prosecuted the present writ of error under the act of March 2, 1907, c. 2564, authorizing the United States to prosecute writs of error in criminal cases on certain points. That act is as follows: "That a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. *From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.* The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recogni-

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zance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." 34 Stat. 1246.

Only that part of the above act of March 2, 1907, is applicable to the present case which authorizes a writ of error by the United States "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." In reviewing that decision may we go beyond the ruling in the court below on the special pleas in bar and consider the various grounds of demurrer to the indictment? That question is answered in the much-considered case of *United States* v. *Keitel*, decided at the present term, 211 U. S. 370, 398. It was there said: "That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reëxamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

We can then consider, on the present writ of error, only the specific question whether the special pleas in bar were sufficient to exclude inquiry in the Federal court into the facts of the alleged murder of Walker for the purpose of ascertaining the punishment to be inflicted by that court upon the defendants, if it should be found in that court that they had conspired to

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injure, oppress, threaten and intimidate the persons named in the indictment in the free exercise and enjoyment of their constitutional rights in violation of the laws of the United States. Previous to the filing of the special pleas the defendants had been legally tried and acquitted in the state court of the charge of having violated the laws of the State in murdering Walker. When, therefore, this case was called for trial in the Federal court and the Government was about to inquire whether the defendants had, in the act of violating the provisions of § 5508, committed the crime of murdering Walker—an offense against the State—the Circuit Court of the United States was confronted with the fact that the defendants had been already acquitted of that charge after a regular trial in the state court.

The question thus presented is within a very narrow compass, and involves an inquiry as to the meaning and scope of § 5509. The conspiracy for which the defendants were indicted was an offense against the laws of the United States. It is none the less so, notwithstanding the requirement in that section as to the punishment to be inflicted upon its appearing that in the act of committing the alleged Federal offense the defendants committed some felony or misdemeanor against the laws of the State. The reference in that section to an offense committed against the State was not for the purpose of restricting or suspending the power of the State to determine whether its laws had been violated and to punish the offender therefor. That reference was for the purpose only of measuring the punishment for the *conspiracy* charged by the United States, upon its being found at the trial in the Federal court that such conspiracy in violation of the Federal statute had been aggravated by the commission of an offense against the State, "an aggravation merely of the substantive offense of conspiracy," not a distinct, separate offense against the United States to be punished by it without reference to the conspiracy charged in the indictment. *Rakes* v. *United States*, 212 U. S. 57; *Davis* v. *United States*, 107 Fed. Rep. 753. Where the commission of a Federal offense is accompanied by an offense committed against the laws of the State,

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it is no doubt competent to so measure the punishment for the Federal offense as to make it equal to the punishment prescribed by the State for the crime committed against the State in the act of violating the Federal law. But is § 5509 so worded as to *require* the Federal court, *after* the defendants have been lawfully tried and acquitted as to the identical crime of murder mentioned in the indictment in that court, to enter upon a judicial investigation to ascertain whether the defendants committed the alleged crime against the State of the murder mentioned in that indictment? We think not. The murder in question, if committed at all, was, as a distinct offense, a crime only against the State, and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction of it *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them. If this be not so, it follows that, notwithstanding the lawful acquittal of the defendants by the only tribunal that could lawfully try them for the alleged offense against the State, the United States may, in this case, in the Circuit Court of the United States, punish them *for the conspiracy charged*, precisely as the state court could have punished them for murder if the defendants had been previously found guilty of that crime in the state court. We do not think that § 5509 is necessarily to be so construed. Nor do we think that Congress intended any such result to occur. Such a result should be avoided if it be possible to do so. We hold that it can be avoided without doing violence to the words of the statute. The language of that section is entirely satisfied and the ends of justice met if the statute is construed as *not* embracing, nor intended to embrace, any felony or misdemeanor against *the State* of which, *prior to the trial in the Federal court of the Federal offense charged*, the defendants had been lawfully acquitted of the alleged state offense by a state court having full jurisdiction in the premises. This interpretation recognizes the power of the State, by its own tribunals, to try offenses against its laws and to acquit or punish the alleged offender, as the facts may justify.

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In this connection it has been suggested that the State might, under this interpretation, defeat the full operation of the act of Congress. Not at all. The interpretation we have given to § 5509 will not prevent the trial of the defendants upon the charge of conspiracy and their punishment, if guilty, according to § 5508, namely, by a fine not exceeding five thousand dollars and imprisonment not more than ten years. The only result of the views we have expressed is that in the trial of this case in the Federal court § 5509 cannot be applied, because it has been judicially ascertained and determined by a tribunal of competent jurisdiction—the only one that could finally determine the question—that the defendants did not murder Walker. The Federal court may proceed as indicated in § 5508, without reference to § 5509. The lawful acquittal of the defendants of the charge of murder makes § 5509 inapplicable in the present trial for conspiracy in the Federal court. In other words, the Federal court may proceed—the defendants having been lawfully acquitted in the state court of the crime of murdering Walker—just as if no such crime was committed or alleged to have been committed by them in the act of violating the provisions of § 5508. As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should the Federal court accept the judgment of a state court based upon a verdict of acquittal of a crime *against the State*, whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in the Federal court for an offense against the United States.

It should be said that the record discloses nothing that impeaches the good faith of the state court in its trial of these defendants on the charge of having murdered Walker. There is nothing to show, if that be material, that the trial in the state court was hastened or wrongly conducted in order that it might have effect upon the trial for conspiracy in the Federal court.

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Without discussing other aspects of the case referred to by counsel, we hold, for the reasons stated, that the special pleas in bar were properly sustained, and that the judgment as respects those pleas must be affirmed.

*It is so ordered.*

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## HURLEY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF THE MOUNT CARMEL COAL COMPANY, BANKRUPT, APPELLANTS, *v.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 95. Argued January 26, 27, 1909.—Decided April 5, 1909.

*Coder* v. *Arts*, *post*, p. 223, followed as to the jurisdiction of this court of appeals from the Circuit Court of Appeals in bankruptcy proceedings, where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on writ of error from the highest court of a State to this court.

Equity looks at substance and not at form. An advance payment for coal yet to be mined may be a pledge on the coal and, in that event, as in this case, the trustee in bankruptcy takes the mine subject to the obligation to deliver the coal as mined to the extent of the advancement.

153 Fed. Rep. 503, affirmed.

THERE is practically no controversy in respect to the facts in this case. We take the following statement from the opinion of the Circuit Court of Appeals: In 1896 the Osage Carbon Company and the Cherokee and Pittsburg Coal and Mining Company, as parties of the first part, and Charles J. Devlin, as party of the second part, and the railway company as party of the third part, entered into an agreement whereby the parties of the first part leased to Devlin for a term of three years certain coal lands located in the State of Kansas, with the right to mine coal therefrom, and Delvin, the party of the second part, agreed

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to sell and deliver to the railway company, and the latter to buy from him daily, all the coal required by it in the operation of certain of its lines of railroad in the State of Kansas at prices stated in the lease, payment to be made by the railway company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the railway company to terminate the lease for failure by Devlin to perform any of his undertakings, and the right to assign the lease was made, subject to the consent of the railway company. Subsequently, Devlin duly assigned to the Mount Carmel Coal Company all his rights under the lease. By two successive agreements this contract was extended until June, 1906. All the parties continued in the performance of their respective obligations until July, 1905, when the Mount Carmel Company was adjudicated a bankrupt. Receivers were appointed and authorized to conduct the business of the bankrupt in the usual course until trustees should be chosen. The receivers and the subsequently appointed trustees successively continued to operate the mines under the orders of the court and to deliver the coal as required by the contract. While the receivers were in charge the railway company and the two coal companies, the original lessors, filed their joint intervening petition, setting forth their relations to the bankrupt under the contract, their rights thereunder, as already stated, and, in substance, that by an agreement between them and the bankrupt the contract had been modified to the extent that the railway company had agreed that without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the Mount Carmel Coal Company and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes. In pursuance of that agreement and for the purposes stated it had advanced $57,304.16, with the understanding that it should be repaid by the subsequent delivery of coal; that the intervening bankruptcy proceedings of July 7 and the appointment of receivers by the

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court alone prevented the bankrupt from carrying out its agreement and delivering the coal as required by the contract. The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them, or that the receivers be directed to deliver to the railway company the amount of coal so paid for in advance.

A referee, to whom the intervening petition was referred, reported unfavorably to the granting of any relief. His report was afterwards confirmed by the District Court and the petition dismissed. The referee found and reported that the amount claimed by the railway company was as stated in the intervening petition, and was advanced to enable the bankrupt to meet its pay rolls, but found that there was no testimony indicating an intention to modify the written lease. The District Court, in reviewing the action of the referee, said: "True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing the coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August, as claimed, but at the time of the failure of the bankrupt the coal remained in the ground unmined." Both the referee and the District Court found that the agreement for the advance of the money was a separate, independent, parol contract, and had nothing to do with the original written contract as shown by the lease, and that, being such an independent, parol contract, there was no lien upon any of the property for its payment.

The Circuit Court of Appeals, 82 C. C. A. 453, reversed the judgment of the District Court and held that that court should have directed a surrender of the leased premises or required the trustees, upon assumption of the lease, to mine and deliver to the railway company sufficient coal to cover its advances; and it further held that the lease having expired, the assets of the estate, consisting in part of the money received for coal delivered to the railway company, should be subject to the payment of such debt as a preferential claim.

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*Mr. Frank Hagerman*, with whom *Mr. John S. Dean* was on the brief, for appellants:

Inasmuch as the fund out of which the advances were to be repaid remained in the bankrupt's custody, no equitable assignment was made, or equitable charge created, hence upon no theory could the intervenors prevail.

The pleadings, evidence, referee's report, finding of the trial judge and opinion of the Circuit Court of Appeals all show that the alleged payment was expected to be made from a fund in the custody of the debtor.

There was no assignment if the payment was to be from fund in hands of the debtor. *Christmas* v. *Russell*, 14 Wall. 69, 84; *Dillon* v. *Barnard*, 21 Wall. 430, 440; *Meyer* v. *Delaware R. R. Construction Co.*, 100 U. S. 457, 477; *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183, 184; *Putnam Savings Bank* v. *Beal*, 54 Fed. Rep. 579; *Badgerow* v. *Manhattan Co.*, 74 Fed. Rep. 926; *Commercial Bank* v. *Rufe*, 92 Fed. Rep. 795; *Hale* v. *Dressen*, 76 Minnesota, 183; *Hicks* v. *Roanoke Brick Co.*, 94 Virginia, 746; *Hossack* v. *Graham*, 20 Washington, 192; *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App. 73.

Bankruptcy gave no higher right to the intervenors. There was no equitable assignment even if a solemn contract had been made by the debtor to pay for advances out of coal to be by it mined in the future. Had there been no bankruptcy, the alleged agreement would have created only a general debt enforcible at law. *Ex parte Tremont Nail Co.*, Fed. Cas. No. 14,168; *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App. 73.

However, had there been a modification of the contract exactly as alleged, written out and attached to the original contract, there could have been no cancellation of the lease. There having been no reservation of the right of reëntry for a breach of the modified agreement, there was no right to a surrender of the property, which was the only relief sought. 18 A. & E. Enc. of L. (2d ed.), 369; *Hague* v. *Ahrens*, 53 Fed. Rep. 58, 60.

To like effect are: *In re Pennewell*, 119 Fed. Rep. 1391; *Doe*



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v. *Godwin*, 4 Maule & S. 265; *Crawley* v. *Price*, L. R. 10 Q. B. 302; *Den* v. *Post*, 25 N. Y. Law, 285; *Spear* v. *Fuller*, 8 N. H. 174; *Wheeler* v. *Dascombe*, 3 Cush. 285; 1 Washb. Real Prop., § 504.

*Mr. Robert Dunlap*, with whom *Mr. Wm. H. Smith* and *Mr. Gardiner Lathrop* were on the brief, for appellees:

By advancing or prepaying, at the request of the bankrupt, for coal which that company was obliged to furnish under the written lease and agreement, that company and the railway company to that extent and in that particular varied or modified the mode of performance required of the railway company by the written contract and modified or varied its terms so far as applicable to coal so paid for in advance. That, as contracting parties, they had the lawful right to do, and strangers to the contract are in no position to question what was done. 1 Parsons on Contracts (9th ed.), star pages 4 and 5; *Youngberg* v. *Lamberton*, 91 Minnesota, 100; *Bryant, Adm.*, v. *Stephens* 58 Alabama, 636; *Holman & Woods* v. *The Georgia R. R.*, 67 Georgia, 595; *Cline* v. *Shell*, 43 Oregon, 372; *Hull* v. *Pitrat*, 45 Fed. Rep. 94; *Insurance Co.* v. *Hinesley*, 75 Indiana, 1; *Prudential Ins. Co.* v. *Sullivan*, 27 Ind. App. 30.

The testimony shows that the transactions between the railway company and the coal company were understood and intended by the parties as a variation or modification in the mode of performance of the written stipulations in the agreement to the extent that the advances were made by the railway company. Such advances were not made on the general credit of the coal company, but in view of and upon the strength of its contract obligation to furnish the railway company with coal under the written agreement.

This arrangement was made in view of the contractual relations between the parties, as evidenced by the written contract, and it must be assumed that the advances were made on the faith of and in reliance upon the contract obligation of the Mount Carmel Company to furnish coal. *Carr* v. *Hamilton*,

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129 U. S. 252; *Fourth St. Bank* v. *Yardley*, 165 U. S. 634; *Jennings* v. *Bank*, 79 California, 323; *Stellings* v. *Jones Lumber Co.*, 116 Fed. Rep. 261, 266, 267.

The trustee in bankruptcy, in assuming to take the benefits under or to carry out the lease and agreement of the coal company, stood in the same plight as that company in respect to such contract, and could only assume it or take the benefits thereunder subject to all adjustments theretofore made and to all equities in favor of all the other parties to such agreement and in the exact condition in which such contract was at the date of the adjudication in bankruptcy. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Stewart* v. *Platt*, 101 U. S. 731; *Yeatman* v. *Savings Institution*, 95 U. S. 764; *Thompson* v. *Fairbanks*, 196 U. S. 526; *Hauselt* v. *Harrison*, 105 U. S. 401; *Winsor* v. *McLellan*, 2 Story, 492 (Fed. Cas. No. 17,887); *Winsor* v. *Kendall*, 3 Story 507 (Fed. Cas. No. 17,886); *Ex parte Newhall*, 2 Story, 360 (Fed. Cas. No. 10,159).

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

We shall not stop to discuss the question of jurisdiction. That whole subject has been so fully considered in the case just decided of *Coder, Trustee, etc.*, v. *Arts*, *post*, p. 223, that any further discussion of the subject would be superfluous.

We pass directly to the merits, and in order to a clear understanding of them the facts of the dealings between the coal company and the railway company must be borne in mind. The railway company entered into its original contract for the sake of securing the constant supply of coal necessary for the operation of part of its railway. It was to take from the coal company daily all the coal required therefor at prices fixed in the contract, and to make payment therefor on the fifteenth day of each month for all coal delivered to it during the preceding calendar month. It was not engaged in the business of money

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lending. Its entire arrangement was for the purpose of securing daily its needed coal, and that was fully understood by all the parties. After a while the coal company became embarrassed, found difficulty in securing money for the payment of its employés, whereupon and in order to prevent any delay on the part of the coal company or any embarrassment which it, the railway company, might suffer from failing to receive from the coal company the needed amount of coal it advanced money to the coal company to enable it to pay its employés, and thus to continue the performance of its obligation to mine and deliver the coal. The railway company was simply paying in advance instead of waiting until the fifteenth day of the succeeding month, and the money by it loaned was not loaned as an independent transaction—such as would be made by an ordinary money lender—but an advancement made in anticipation of the delivery of the coal. To ignore this element and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company would result in destroying the full equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into this original arrangement. While decisions directly in point may not be found, yet see *Ketchum* v. *St. Louis*, 101 U. S. 306–317; *Hauselt* v. *Harrison*, 105 U. S. 401; *Carr* v. *Hamilton*, 129 U. S. 252; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634. In *In re Chase*, 59 C. C. A. 629, 631, Circuit Judge Putnam, delivering the opinion of the Circuit Court of Appeals of the First Circuit, says:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th ed.), 191. Indeed, bankruptcy proceeds on equitable principles so

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broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

In *Thompson* v. *Fairbanks*, 196 U. S. 516, 526, this court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

The purpose of the parties is very clearly expressed in the following quotation from the opinion of the Court of Appeals:

"It appears that the coal company, while the contract was still in force and being executed, became embarrassed and unable to meet its pay rolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for fifteen days after the coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following, at the price fixed by the original contract. This arrangement, made when the coal company was in embarrassed circumstances, and obviously inspired by the necessity of meeting the pay rolls, and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive

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provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

"The contract after the new arrangement remained as before. The coal company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the railway company as before. The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and treat it as creating an equitable charge or lien, however inartificially it may have been expressed."

We fully approve of this interpretation of the transaction. Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature

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remained undisturbed thereby. If there had been no bankruptcy proceedings the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement.

We think the conclusions of the Circuit Court of Appeals are right, and its judgment is

*Affirmed.*

MR. JUSTICE HOLMES concurs in the judgment.

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## KEERL v. STATE OF MONTANA.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 113. Argued March 15, 1909.—Decided April 5, 1909.

Where the accused during the trial specifically claims that the action of the state court in denying his plea of once in jeopardy operated to deprive him of his liberty without due process of law contrary to the Fourteenth Amendment, this court has jurisdiction under § 709, Rev. Stat., to review the judgment.

Where a state court has the right to discharge the jury if it satisfactorily appear after a reasonable time that a disagreement is probable, and the state court so finds after the jury has been out for twenty-four hours, and discharges the jury, the result is a mistrial and the accused cannot on a subsequent trial interpose the plea of once in jeopardy by reason thereof, *United States* v. *Perez*, 9 Wheat. 579; and so *held* in regard to a trial in Montana where the jury had been discharged under § 2125, Penal Code of that State.

*Quære*, and not decided, whether the due process provision of the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy.

33 Montana, 501, affirmed.

ON April 24, 1902, an information was filed in the District

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Court of Lewis and Clark County, Montana, charging the defendant, now plaintiff in error, with the crime of murder. Upon a trial he was found guilty of murder in the second degree and sentenced to imprisonment for life. The judgment was reversed by the Supreme Court and a new trial ordered. 29 Montana, 508. The record recites that on the second trial the jury retired for deliberation on July 12, 1904, and that on July 14, 1904, they returned into court, "whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree the court ordered the jury discharged from the further consideration of this cause," and remanded the defendant to the custody of the sheriff. On the third trial the defendant interposed a plea of once in jeopardy, on the ground that the jury was improperly discharged at the end of the second trial. The Montana statute provides:

"Except as provided in the last section [a section respecting sickness or accident] the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree." Section 2125, Penal Code; vol. 2, Montana Codes, p. 1061.

The court overruled the plea, and, as a result of the trial, the defendant was found guilty of manslaughter and sentenced to imprisonment for the term of ten years. This judgment was sustained by the Supreme Court. 33 Montana, 501. Thereupon the case was brought here on writ of error.

*Mr. Thomas J. Walsh*, with whom *Mr. Cornelius B. Nolan* was on the brief, for plaintiff in error.

*Mr. W. H. Poorman*, with whom *Mr. Albert J. Galen*, Attorney General of the State of Montana, and *Mr. E. M. Hall* were on the brief, for defendant in error.

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MR. JUSTICE BREWER delivered the opinion of the court.

The defendant during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, our jurisdiction of the writ of error cannot be questioned. *Beer Co.* v. *Massachusetts*, 97 U. S. 25–30; *Bohanan* v. *Nebraska*, 118 U. S. 231; *Boyd* v. *Thayer*, 143 U. S. 135–161.

On the merits, there is little room for controversy. In *United States* v. *Perez*, 9 Wheat. 579, 580, this court passed upon the question arising under the Fifth Amendment, whose language is in this respect more specific than that in the Fourteenth Amendment, the former applying to the courts of the United States, the latter to the action of the State, and it was held:

"We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further

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proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

This has been the settled law of the Federal courts ever since that time. *Logan* v. *United States*, 144 U. S. 263, 297; *Thompson* v. *United States*, 155 U. S. 271, 274; *Dreyer* v. *Illinois*, 187 U. S. 71, 85.

Those decisions dispose of the question here presented, without considering whether the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy, a question which, as it is unnecessary, we do not decide. The record shows that the jury were kept out at least twenty-four hours, and probably more, and the trial court found that there was a reasonable probability that the jury could not agree. This is the only Federal question, and, finding no error therein, the judgment of the Supreme Court of Montana is

*Affirmed.*

## KELLER *v.* UNITED STATES.
## ULLMAN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 653, 654. Argued March 1, 1909.—Decided April 5, 1909.

Speaking generally, the police power is reserved to the States and there is no grant thereof to Congress in the Constitution.

Notwithstanding the offensiveness of the crime the courts cannot sustain a Federal penal statute if the power to punish the same has not been delegated to Congress by the Constitution.

Where there is collision between the power of the State and that of Congress, the superior authority of the latter prevails. While Congress has power to exclude aliens from, and to prescribe the terms and conditions on which aliens may come into, the United States, *Turner* v. *Williams*, 194 U. S. 279, that power does not extend to controlling dealings with aliens after their arrival merely on account of their alienage.

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That portion of the act of February 20, 1907, c. 1134, 34 Stat. 898, which makes it a felony to harbor alien prostitutes *held*, unconstitutional as to one harboring such a prostitute without knowledge of her alienage or in connection with her coming into the United States, as a regulation of a matter within the police power reserved to the State and not within any power delegated to Congress by the Constitution.

SECTION 3 of the act of Congress of February 20, 1907, c. 1134, 34 Stat. 898, 899, entitled "An act to regulate the immigration of aliens into the United States" reads as follows:

"SEC. 3. That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or *whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars;* and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act."

The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and in terms that they "wilfully and knowingly did keep, maintain, control, support and harbor in their certain house of prostitution" (describing it) "for the purpose of prostitution a certain alien woman, to wit, Irene Bodi," who was, as they well knew, a subject of the

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King of Hungary, who had entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months.

*Mr. Benjamin C. Bachrach,* with whom *Mr. Elijah N. Zoline* was on the brief, for plaintiffs in error:

The power to regulate vice and morality within the confines of a State is exclusively within the police power of the particular State and Congress has no power to pass laws of this nature affecting persons within the confines of any State. The police power of the State was never surrendered to the Federal Government. It is reserved to the State to be exercised by it in regulating and directing its internal affairs. *King* v. *Am. Transp. Co.*, 14 Fed. Cas. 512.

A State cannot divest itself of police power; this power is essential to its very existence, and it can neither surrender, abandon or barter it away.

All the powers of our National Government are powers delegated to it by the States, and the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Within the confines of a State of the United States there is no warrant for the exercise of such authority by the Federal Government, and the Federal Government has no such authority within the territory and jurisdiction of a State and over citizens of such State. Within the confines of the State the police power in its broadest and fullest extent exists and operates under state control. It can be invoked without Federal consent, and modified or relaxed without Federal interference. This power is inherent in the State. It finds its field of operation confined within the limits of its territorial jurisdiction. Whenever the Federal Government assumes to exercise police power within the confines of a State it invades the exclusive province and right of the State.

The state law reaches out and punishes offenses of the nature

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embraced in this clause of the act of Congress of February 20, 1907. Under the police power of the State the State has ample authority to deal with the matter in such way as it may deem necessary and adequate, and the Federal Government has no power and no authority, corrective or visitorial, over the policy of the State in matters of police.

An alien after landing becomes amenable to the laws of the State in which he resides. Its police power reaches out and stretches around him to punish or protect him just the same as it does over a citizen. The laws of the State where he resides are invoked for his protection and for his punishment. The Federal laws have to do with his entering this country, but once he is admitted their application and operation terminates. Under the Federal law he may be deported for cause, yet to no punishment provided by Federal law can he be subjected for criminal acts committed within and punished by the State. Under the state law he must be tried and punished for his offense, the same as a citizen would be.

Upon the question of the power of Congress to enact the provisions herein in question, see *McCullough* v. *Maryland*, 4 Wheat. 405; *Houston* v. *Moore*, 5 Wheat. 48; *The Civil Rights Cases*, 109 U. S. 3; *The License Cases*, 5 How. 576; *Gibbons* v. *Ogden*, 9 Wheat. 203; *King et al.* v. *American Transp. Co.*, 14 Fed. Cas. 513; *Passenger Case*, 7 How. 283; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666; *City of New York* v. *Miln*, 11 Pet. 139; *United States* v. *DeWitt*, 9 Wall. 41; *Slaughter House Cases*, 6 Wall. 64; *Patterson* v. *Kentucky*, 97 U. S. 503; *United States* v. *Knight*, 156 U. S. 11; *In re Rahrer*, 140 U. S. 555.

*Mr. Assistant Attorney General Fowler* for defendant in error:

The general powers of Congress with reference to aliens have been repeatedly declared by this court. *Turner* v. *Williams*, 194 U. S. 289; *Fong Yue Ting* v. *United States*, 149 U. S. 708; *Lees* v. *United States*, 150 U. S. 476, 480; *United States* v. *Bitty*, 208 U. S. 393.

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The validity of the clause in question should be maintained because it relates to and materially affects the importation of the class of women mentioned therein.

The provisions in question did not appear in the act of March 3, 1903, 32 Stat. 1214, and manifestly Congress ascertained that, owing to the many subterfuges resorted to by those interested in the importation of women and girls for the purpose of prostitution and other immoral purposes, it was necessary to make it conclusive evidence that the importation was for such immoral purpose as she might be found engaged in within three years after her entry, and that he who might be found keeping her for an immoral purpose within such time, should be deemed to do so in pursuance of an unlawful importation. Viewed in that light, the provision is not at all unreasonable, and is most salutary in its restraint upon the importation of women and girls for such purposes; because it would be a comparatively easy matter to cover up an arrangement with a female that she come to the United States for an immoral purpose, and have her imported in such manner that it would be practically impossible for the object of the importation to be ascertained; while, if she is prohibited from engaging in such business, and all persons be prohibited from keeping her for such purpose for three years after her arrival, the inducement to procure alien females for immoral purposes would be destroyed.

The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion.

The admission of an alien female under this act may be regarded as only conditional, and for three years she is on probation; and, if within that time she be guilty of the acts therein mentioned, she forfeits her right to remain. And it is certainly within the power of Congress to provide a punishment for those who thus bring about her expulsion.

The validity of the provision in question should be deter-

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mined from its general effect upon the importation and exclusion of aliens.

The question is, Do its provisions, and the fact that those who are guilty of such conduct as that for which plaintiffs in error have been convicted may be prosecuted in the United States courts, materially reduce the importation of females for immoral purposes, and thus restrain an evil with reference to which it has been universally held that Congress has the power to legislate? If they do, then this provision falls within the purview of congressional legislation, and is valid, notwithstanding the fact that the State has, in the exercise of its reserved powers, the right to punish plaintiffs in error for the same conduct.

There is nothing antagonistic or conflicting in the existence of these dual punishments for the same acts, inasmuch as they constitute two distinct offenses, the one against the state government and the other against the National Government; and the right of each of these two governments to inflict punishment for the same act has repeatedly been recognized by this court. *Moore* v. *The People*, 14 How. 14, 20; *Coleman* v. *Tennessee*, 97 U. S. 509; *Grafton* v. *United States*, 206 U. S. 333, 354. See also *United States* v. *Coombs*, 12 Pet. 71; *United States* v. *Marigold*, 9 How. 560, 568; *United States* v. *Bridleman*, 7 Fed. Rep. 894; *United States* v. *Holiday*, 3 Wall. 407.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, "Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive

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officers." *Turner* v. *Williams*, 194 U. S. 279, 289. See also *Fong Yue Ting* v. *United States*, 149 U. S. 698, 708; *Head Money Cases*, 112 U. S. 580, 591; *Lees* v. *United States*, 150 U. S. 476, 480; *United States* v. *Bitty*, 208 U. S. 393.

It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the Constitution no grant thereof to Congress.

In *Patterson* v. *Kentucky*, 97 U. S. 501, 503, is this declaration:

"'In the American constitutional system,' says Mr. Cooley, 'the power to establish the ordinary regulations of police has been left with the individual States, and cannot be assumed by the national government.' Cooley, Const. Lim. 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized in this court. *Gibbons* v. *Ogden*, 9 Wheat. 1; *License Cases*, 5 How. 504; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Henderson* v. *Mayor of the City of New York*, 92 U. S. 259; *Railroad Company* v. *Husen*, 95 U. S. 465; *Beer Company* v. *Massachusetts*, 97 U. S. 25. It is embraced in what Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, calls that 'immense mass

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of legislation,' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."

And in *Barbier* v. *Connolly*, 113 U. S. 27, 31, it is said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, declares:

"This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist."

In *Houston* v. *Moore*, 5 Wheat. 1, 48, Mr. Justice Story says:

"Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution." Art. X of Amendments; *City of New York* v. *Miln*, 11 Pet. 102, 133; *License Cases*, 5 How. 504, 608, 630; *United States* v. *Dewitt*, 9 Wall. 41, 44; *Patterson* v. *Kentucky*, 97 U. S. 501, 503; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *In re Rahrer*, 140 U. S. 545, 555; *United States* v. *Knight*, 156 U. S. 1, 11; Cooley's Constitutional Limitations, 574.

Doubtless it not infrequently happens that the same act



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may be referable to the power of the State, as well as to that of Congress. If there be collision in such a case, the superior authority of Congress prevails. As said in *City of New York* v. *Miln*, 11 Pet. 102, 137:

"From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power, subject only, say the court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power."

In *Gulf, Colorado & Santa Fe Railway* v. *Hefley*, 158 U. S. 98, 104, the rule is stated in these words:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson* v. *New York*, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined

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by the Constitution, the latter must prevail.'" *Morgan* v. *Louisiana*, 118 U. S. 455, 464. See also *Lottery Case*, 188 U. S. 321.

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By § 2 of Art. II of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary under which this legislation can be supported.

The general power which exists in the Nation to control the coming in or removal of aliens is relied upon, the Government stating in its brief these two propositions:

"The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion.

* * * * * * * *

"The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens."

But it is sufficient to say that the act charged has no significance in either direction.

As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it, and the testimony shows, without any contradiction, that the woman, Irene Bodi, came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts the question of the power of Congress to punish

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those who assist in the importation of a prostitute is entirely immaterial.

The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determines the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the Government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was in round numbers 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country

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as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank* v. *United States*, 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

*The judgments are reversed, and the cases remanded to the District Court of the United States for the Northern District of Illinois with instructions to quash the indictment.*

MR. JUSTICE HOLMES, dissenting.

For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. *Yamataya* v. *Fisher* (*Japanese Immigrant Case*), 189 U. S. 86. To this end it may make their admission conditional for three years. *Pearson* v. *Williams*, 202 U. S. 281. If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they came in. Such retrospective presumptions are not always contrary to experience or unknown to the law. *Bailey* v. *Alabama*, 211 U. S. 452, 454. If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long.

The statute does not state the legal theory upon which it was enacted. If the ground is that which I have suggested, it is fair

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to observe that the presumption that it creates is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justification must be the same are familiar in the States. For instance, one creating the offense of being present when gaming implements are found, *Commonwealth* v. *Smith*, 166 Massachusetts, 370, 375, 376, or punishing the sale of intoxicating liquors without regard to knowledge of their intoxicating quality, *Commonwealth* v. *Hallett*, 103 Massachusetts, 452, or throwing upon a seducer the risk of the woman turning out to be married or under a certain age. *Commonwealth* v. *Elwell*, 2 Met. 190; *Reg.* v. *Prince*, L. R. 2 C. C. 154. It is true that in such instances the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does, at least as a general rule, is to say that it has changed the substantive law. 2 Wigmore, Ev., §§ 1353 *et seq.* This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare and of a kind that indicates a preëxisting habit that would have excluded the party if it had been known. Therefore I am of opinion that it is within the power of Congress to order the deportation of a woman found practicing prostitution within three years.

If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who coöperate in their fraudulent entry. "If Congress has power to exclude such laborers . . . it has the power to punish any who assist in their introduction." That was a point decided in *Lees* v. *United States*, 150 U. S. 476, 480. The same power must exist as to coöperation in an equally unlawful stay. The indictment sets forth the facts that constitute such coöperation

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and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know in any event to be contrary to law. Therefore, while I have admitted that the time fixed seems to me to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail.

MR. JUSTICE HARLAN and MR. JUSTICE MOODY concur in this dissent.

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## MURRAY, McSWEEN, AND PATTON, CONSTITUTING THE STATE DISPENSARY COMMISSION OF SOUTH CAROLINA, v. WILSON DISTILLING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 625. Argued February 26, March 1, 1909.—Decided April 5, 1909.

Purchases made by state officers of supplies for business carried on by the State are made by the State, and suits by the vendors against the state officers carrying on or winding up the business are suits against the State and, under the Eleventh Amendment, beyond the jurisdiction of the Federal courts; and so *held* as to suits against commissioners to wind up the State Liquor Dispensary of South Carolina.

A bill in equity to compel specific performance of a contract between an individual and a State cannot, against the objection of the State, be maintained in the Federal courts. *Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233.

A state statute will not, by strained implication, be construed as a divestiture of rights of property, or as authorizing administration of the assets of a governmental agency, without the presence of the State, and so *held* as to the statute of South Carolina providing for winding up the State Liquor Dispensary.

The consent of a State to be sued in its own courts by a creditor does not give that creditor the right to sue in a Federal court. *Chandler* v. *Dix*, 194 U. S. 590.

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Even though state legislation and decisions as to the construction of state statutes may not be controlling upon this court, yet they may be persuasive.

Although by engaging in business a State may not avoid a preëxisting right of the Federal Government to tax that business, the State does not thereby lose the exemption from suit under the Eleventh Amendment. *South Carolina* v. *United States*, 199 U. S. 437, distinguished.

The legal history of the constitutional provisions and legislative enactments of South Carolina in regard to the State Liquor Dispensary, reviewed.

161 Fed. Rep. 152, reversed.

THE facts are stated in the opinion.

*Mr. B. L. Abney*, with whom *Mr. J. Fraser Lyon* was on the brief, and *Mr. W. F. Stevenson*, for petitioners:

The commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay the same over out of the fund. The assets are still the assets of the State. Being officers of the State, with the funds of the State in their possession belonging to the State, and these suits being brought by alleged creditors of the State, the State is the real party in interest, and the suit is virtually against the State. See opinion below; *McHose* v. *Dutton*, 55 Iowa, 728; *Brown University Case*, 56 Fed. Rep. 55; *Yale College Case*, 52 Fed. Rep. 177; *Lowery* v. *Thompson*, 25 S. Car. 416; *Board &c.* v. *Gantt*, 76 Virginia, 455; *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 177 U. S. 52.

The state dispensary commission are not defending any case of trespass or of wrongs they may have committed towards the persons or property of the complainants under an unconstitutional statute; nor are they affirmatively, through and by means of an unconstitutional statute, injuring the complainants or invading any of their property rights; nor are they attempting to enforce an unconstitutional statute. Consequently, this case does not fall within any class of cases mentioned by the court below, nor is it similar to any of the cases

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cited by that court. The action of the court if plaintiff succeeds will have the effect of depriving the State of funds or property in its possession. This conflicts with the Eleventh Amendment. *Louisiana* v. *Jumel*, 107 U. S. 711; *Farmers' National Bank* v. *Jones*, 105 Fed. Rep. 459; *Christian* v. *Atlantic &c. R. Co.*, 133 U. S. 233; *Brown University* v. *R. I. College*, 56 Fed. Rep. 55; *Lowery* v. *Commissioners of Sinking Fund*, 25 S. Car. 416; *Board of Public Works* v. *Gantt*, 76 Virginia, 455.

The act of 1907 did not create a trust nor divest the State of all control or disposal of the state dispensary property. It simply authorizes claimants to sue or to have their claims established against it, and to be paid out of a certain fund. Allowing such claims to be established and sued on could not be construed as admitting the validity of the claim. *Bank* v. *State*, 60 S. Car. 465.

The statute books of the State contain instances where the legislature has seen fit, instead of making the investigation through its own committees, to devolve this duty upon certain persons as commissioners or upon regularly appointed tribunals. But no state decision has ever held that by such act a contract was created between the State and the claimants, which disabled the legislature from either modifying or repealing such statute. *Campbell* v. *Sanders*, 43 S. Car. 577.

If the act of 1907 is nothing more than the creation of a commission before which the State authorizes its creditors to sue and to have their claims established and adjusted, then it cannot amount to a contract irrevocable, and this court has repeatedly so decided: *Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U. S. 337; *Railroad Co.* v. *Alabama*, 101 U. S. 832; *Hans* v. *Louisiana*, 134 U. S. 17; *Baltzer* v. *North Carolina*, 161 U. S. 245; *Ex parte Alabama*, 23 Am. Rep. 567; *In re Ayers*, 123 U. S. 507; *De Saussure* v. *Gaillard*, 127 U. S. 216.

The State by this act expressly devolves the right and duty upon the commission to investigate, determine and ascertain the just liabilities against it held by these claimants, and does

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not authorize suits to be brought against it to establish such liabilities either in its own courts or in the Federal courts. *Smith* v. *Reeves*, 178 U. S. 436; *Chandler* v. *Dix*, 194 U. S. 590; *Maury* v. *Commonwealth*, 92 Virginia, 310.

The highest court of the State is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statutes. *Batchel* v. *Wilson*, 204 U. S. 36.

The Federal courts will follow, in this case, the decision of the Supreme Court of the State construing the act of 1907, unless this court shall take the view that that act created a contract with the claimants, creditors of the State, which the State cannot, by subsequent legislation, interfere with. *Elmendorf* v. *Taylor*, 10 Wheat. 150; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McCullough* v. *Virginia*, 172 U. S. 102; *Mobile Trans. Co.* v. *Mobile*, 187 U. S. 480; *Jack* v. *Kansas*, 199 U. S. 372; *Bacon* v. *Texas*, 163 U. S. 207; *Louisville Trust Co.* v. *Cincinnati*, 76 Fed. Rep. 296; *De Saussure* v. *Gaillard*, 127 U. S. 216; Lewis' Sutherland Stat. Constr., par. 313.

Where the Federal courts are not by rule bound to follow the decisions of the state courts in cases falling within the exception, they will consider such decisions upon the point in question and will incline to an agreement with the state courts. *Mead* v. *Portland*, 200 U. S. 163; *Blair* v. *City of Chicago*, 201 U. S. 400; *Copper Mining Co.* v. *Territorial Board &c.*, 206 U. S. 474; *Theological Seminary* v. *Illinois*, 188 U. S. 662; *Tampa Waterworks* v. *Tampa*, 199 U. S. 241; *Douglas* v. *Kentucky*, 168 U. S. 502.

*Mr. Daniel W. Rountree*, with whom *Mr. Clifford L. Anderson* and *Mr. Thomas B. Felder* were on the brief, also argued for petitioners.

*Mr. Alfred S. Barnard*, with whom *Mr. George B. Lester* was on the brief, for respondent, the Fleischmann Company:

The winding up act of 1907 created a trust, and the funds in the hands of the commission are a trust fund held by them for the benefit of the creditors of the state dispensary.

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If an individual debtor had by a written instrument similar in terms to the act of 1907, placed property or funds in the hands of another to be used as directed in said act, that person would become a trustee. Eliminating all of the foreign matter in this case, it is a plain suit in equity, brought by a *cestui que trust*, to compel a trustee, holding property for his benefit, to perform the duties imposed upon him by the instrument creating the trust. The only novel feature in this case, and that is more apparent than real, is that the trust was created by a State. But this is not new and involves no new principle, for that a State or sovereign can create a trust and that a trust so created is enforceable in a court of equity, see Perry on Trusts (5th ed.), § 30; Beach on Trusts and Trustees (1897 ed.), § 3; *Commissioners* v. *Walker*, 6 How. 143; *Board of Liquidation* v. *McComb*, 92 U. S. 541; *Chaffriax* v. *Board of Liquidation*, 11 Fed. Rep. 638; *Swasey* v. *N. C. R. R. Co.*, 23 Fed. Cas. 518.

The same principle is clearly recognized in *Louisiana* v. *Jumel*, 107 U. S. 711; *Vose* v. *Internal Improvement Fund*, 28 Fed. Cas. 1226; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662. See also *McKee* v. *Lamon*, 159 U. S. 317; *Bearing* v. *Dabney*, 16 Wall. 1; *Clews* v. *Jamieson*, 182 U. S. 461, 479, 480; *Gibbs* v. *Green*, 54 Mississippi, 592; *Maenhaut* v. *New Orleans*, 2 Woods, 108.

This court is not bound by the decision of the Supreme Court of South Carolina, construing the act of 1907. The record shows that this decision was rendered in a proceeding in the Supreme Court of South Carolina to which these complainants were not parties, and after the complainants had filed their bills in the United States Circuit Court for the District of South Carolina, and that court had taken jurisdiction and construed the act of 1907. The complainants were therefore entitled to the independent judgment of the United States Circuit Court in construing that act; and this case is not within the rule which requires this court to follow state decisions in the construction of state statutes. *Pease* v. *Peck*, 18

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How. 595; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Carroll County* v. *Smith*, 111 U. S. 556; *Anderson* v. *Santa Anna Trp. Co.*, 116 U. S. 356; *Pleasant Improvement Co.* v. *Ætna Life Ins. Co.*, 138 U. S. 67; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 533; *Wicomico County* v. *Bancroft*, 203 U. S. 112.

This is not a suit against the State. This suit is brought by the complainants as creditors of the state dispensary to compel the defendants to perform specific duties which the legislature of the State has directed them to perform. The purpose of the suit is not to require the defendants to do that which the law of the State forbids, but to compel them to do what the statute says they shall do. *Rolston* v. *Commissioners*, 120 U. S. 390.

The Eleventh Amendment is of necessity limited to those suits in which the State is a party to the record. In deciding who are parties to a suit the court will not look beyond the record. Making a state officer a party, does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. *Osborne* v. *Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 220; *United States* v. *Lee*, 106 U. S. 196; *Board of Liquidation* v. *McComb*, 92 U. S. 531.

Recent cases in which the court says it will, in determining who are the real parties to the suit, look beyond the record, such as in *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon &c. R. R. Co.*, 109 U. S. 455; *Hagood* v. *Southern*, 117 U. S. 70; *In re Ayres*, 123 U. S. 492, can be distinguished as in those cases there was no trust created, and there was no specific fund which the complainants were seeking to reach.

The State is not claiming any interest in the fund in the hands of these defendants, and in order to enforce the trust imposed by the act of 1907, the State is neither a necessary, nor an indispensable, party. *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Swasey* v. *N. C. R. R. Co.*, 23 Fed. Cas. 518; *Chaffraix* v. *Board of Liquidation*, 11 Fed. Rep. 632; *Tindall* v. *Wesley*, 167 U. S. 220. See also *Ex parte Young*, 209 U. S. 158; *Western*

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*Union Tel. Co.* v. *Myatt*, 98 Fed. Rep. 335; *Atlantic Coast Line R. R. Co.* v. *Virginia Corporation Commission*, 211 U. S. 210.

*Mr. T. Moultrie Mordecai*, with whom *Mr. Frank Carter*, *Mr. Simeon Hyde* and *Mr. H. C. Chedester* were on the brief, for respondent, the Wilson Distilling Company.

MR. JUSTICE WHITE delivered the opinion of the court.

The State of South Carolina in the year 1892 assumed the exclusive management of all traffic in liquor. To carry out this purpose a board of control was created, composed of the governor, the comptroller general and the attorney general, clothed with power to supervise the system of liquor traffic which the act embodied and to adopt general rules and regulations pertaining to the subject. All liquor intended for consumption was required to be bought by an officer styled a commissioner, upon whom was cast the duty of distributing the liquor to local officials, known as dispensers. The funds to initiate the business were drawn from the state treasury. The general features of the act of 1892 were preserved in a statute approved January 2, 1895. Acts S. Car. 1895, p. 721. This last-mentioned act is set out in full in a marginal note to the opinion in *Scott* v. *Donald*, 165 U. S. 58. In that case it was recognized that the act of 1895 provided for the purchase by the State, through its officers or agents, of all liquor to be sold in South Carolina, and although the act was held to be repugnant to the Constitution of the United States, the ruling was not based upon the conception that there was a want of governmental power in the State to become the sole purchaser and seller within its borders of liquor, but exclusively upon the ground that particular provisions contained in the statute discriminated against the products of other States. A new state constitution was ratified, which went into effect from and after December 31, 1895. Therein it was provided as follows:

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Article VIII, section 11, Constitution, 1895.

"In the exercise of the police power the general assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the State. The general assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the State, under such rules and restrictions as it deems proper; or the general assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the State, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the State, to buy in any market and retail within the State liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: *Provided*, That no license shall be granted to sell alcoholic beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: *And provided, further*, That the general assembly shall not delegate to any municipal corporation the power to issue license to sell the same."

Article XI, section 12, Constitution, 1895.

"All the net income to be derived by the State from the sale or license for the sale of spirituous, malt, vinous and intoxicant liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the State, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this article; and if, after said application, there should be a surplus, it shall be devoted to public school purposes, and apportioned as the general assembly may determine: *Provided, however*, That the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquor or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

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Under these provisions, in 1896 (Acts S. Car. 1896, p. 123) a new law concerning the liquor traffic was enacted. The statute provided for the election by the general assembly of a state board of control, clothed with power to purchase all liquors for use in the State. A state commissioner, to be appointed by such board, was empowered to furnish liquors to the various local dispensaries provided for in the statute, which were under the immediate authority of county boards having power to appoint officers, known as dispensers, to sell liquors direct to consumers. The act of 1896 was amended in particulars, not necessary to be detailed, in March, 1897. In *Vance* v. *Vandercook, No. 1*, 170 U. S. 438, the contention that the act of 1896, as amended by the act of 1897, was repugnant to the commerce clause of the Constitution of the United States, was passed upon. The limited ruling made in *Scott* v. *Donald* was stated. It was expressly held that the act in question was a manifestation of the police power of the State, and therefore was within the purview of the provisions of the act of Congress commonly referred to as the Wilson Act. It was decided that as the provisions in the prior act, which were held in *Scott* v. *Donald* to be discriminatory, had been eliminated, the act was not repugnant to the commerce clause of the Constitution in so far as it exerted the absolute control of the State over the purchase and sale of liquor within the State.

In *State* v. *Farnum*, 73 S. Car. 165, decided in 1905, the Supreme Court of South Carolina interpreted the dispensary act of 1896 as amended, and expressly held that "The offices and places of business of the dispensary stand precisely in the same relation to the State as the State Treasurer's office." And, speaking of the dispensary system, it was said (p. 171):

"The State has undertaken to take charge of the liquor business of the State, and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States."

The law of 1896, as amended, was repealed on February 16, 1907. Acts S. Car. 1907, p. 463. The repealing act did away

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with the general control of the traffic by means of a state board, and therefore abolished that board. Instead of the system previously existing a more local one was substituted. The question whether liquor should be sold in a particular county was left to the voters of the county. If, as the result of an election, it was determined that the traffic in liquor should exist in the county, it was provided that such traffic should be exclusively carried on by means of county boards, appointed by the governor. Conformably to the constitution, these boards were authorized to buy, "in the name of the State," liquors to be sold within the county, with a proviso, however, restricting the liability of the State to the sum of the assets of the local dispensary.

On the same day that the foregoing act was approved there was also approved a statute, entitled "An act to provide for the disposition of all property connected with the State dispensary and to wind up its affairs." The text of this act is in the margin.[1] Summarily stated, the act created a commission to

[1] AN ACT to Provide for the Disposition of all Property Connected with the State Dispensary, and to Wind Up Its Affairs.

SECTION 1. *Be it enacted by the General Assembly of the State of South Carolina*, That immediately upon the approval of this act the governor shall appoint a commission of well-known business men, consisting of five members, none of whom shall be members of the general assembly, to be known as the state dispensary commission, who shall each give bond for the faithful performance of the duties required, in the sum of $10,000.

SEC. 2. Said commission shall immediately organize by the election of a chairman and secretary from their number.

SEC. 3. It shall be the duty of said commission to close out the entire business and property of the state dispensary except real estate, and including stock in the several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said commission shall be at liberty to make such disposition upon such terms, times and conditions as their judgment may dictate: *Provided*, That no alcoholic liquors or beers shall be disposed of within this State except to county dispensary boards, and all liquors illegally bought by the present management may be returned to

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consist of five members, to be appointed by the governor, who were required to give bond to the State for the faithful discharge of their duties. To this body was given the control of all the funds, assets and property, other than real estate, of the state dispensary. It was made the duty of the commission to investigate all facts concerning outstanding claims against the state dispensary, and for that purpose to employ counsel as might be approved by the attorney general, and such expert accountants and clerks as were necessary, and to make full report to the governor on the subject. The commission was also authorized, after investigation, to pay, from the proceeds of the dispensary assets which might come into its hands, such claims as were found to be valid and to turn over the surplus to the state treasury.

The commission thus authorized was appointed and began the discharge of its duties. To this end a list of the outstanding claims asserted to be due was made up and a hearing concerning their amount and validity was commenced. For the purpose

the persons, firms or corporations from whom purchased, and for determining the legality of said purchases they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the attorney general, and such expert accountants and stenographers and any other person or persons the commission may deem necessary for the ascertainment of any fact or facts connected with said state dispensary and its management or control at any time in the past, and to take testimony, either within or without the State: *Provided further*, That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

SEC. 4. The compensation of each member of said commission shall be $5 per day for each day actually employed about the business, and actual expenses for the time engaged: *Provided*, That they shall receive no compensation for services rendered on this commission after January 1, 1908.

SEC. 5. The said commission shall pay to the state treasurer, after deducting their compensation and other expenses allowed by this act, all surplus funds on hand after paying all liabilities.

SEC. 6. The said commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants and employés as they may



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of this hearing a call was made by the commission for the production by the parties asserting claims of original books of entry, showing the previous transactions with the State from which the claims arose and the production for oral examination of certain witnesses. The right of the commission to enter upon this investigation was disputed by some of the claimants and they refused to comply with the call made for books and papers and the production of witnesses. Thereupon certain of such claimants invoked the authority of the Circuit Court of the United States for the District of South Carolina by the commencement of the suits which are now before us. The first was brought against the members of the commission by the Wilson Distilling Company, a New Jersey corporation, having its principal place of business in the city of Baltimore, the bill being filed not only on its own account but on behalf of all others who might join in the cause. The complainant in the second suit, which was also against the members of the commission, both officially and individually, was the Fleischmann Company, an Ohio corporation. Without detailing the proceedings by which

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deem necessary, and to contract with them at the time of employment for their compensation.

SEC. 7. The said commission shall submit to the governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the state dispensary, and as soon as the affairs are liquidated a report in full of their actings and doings.

SEC. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation of the dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the commission provided for under this act: *Provided*, That for the purpose of the investigation of the affairs of the dispensary, as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission.

Approved the 16th day of February, A. D. 1907.

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other claimants were joined as co-complainants in the Wilson suit and by which the relief sought in that case and in the Fleischmann case—which was somewhat divergent in the earlier stage of the litigation—was made to harmonize, it suffices to say that in their ultimate form both bills of complaint rested the jurisdiction of the court upon diversity of citizenship, asserted the existence of a valid claim against the dispensary fund in favor of each complainant for liquor sold, and that each was entitled to be paid out of the fund in the hands of and under the control of the commission. The bills also proceeded upon the theory that the act of 1907 had placed the assets of the dispensary in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against the fund, which they were entitled to enforce by judicial action against the commission, without the presence of the State as a necessary party. Upon this assumption and upon the averment that the members of the commission were refusing to discharge the duty cast upon them by the state law, of ascertaining and paying the just claims against the trust fund, an injunction was prayed, restraining the commission from in any way disposing of the fund until the claims of the complainants were paid. A receiver was also asked for the purpose of taking charge of the assets, paying the valid claims against the same, including those of the complainants, and otherwise settling, under the direction of the court, the affairs of the state dispensary.

In both cases a temporary restraining order was allowed, and a rule was granted to show cause why an injunction *pendente lite* should not be made and a receiver appointed as prayed. Again omitting detail as to the form of the pleadings, it suffices to say that, by return to the rules to show cause and by answers, the commission, besides traversing most of the averments contained in the bills, set up in substance that each suit was against the State, and that the State had not consented to be sued, and could not be impleaded without violating the Eleventh Amendment to the Constitution. It was expressly averred that the assets and property in the hands of the commission belonged to

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the State, were held by the commission as its agent and could not be administered without the presence of the State, which was an indispensable party to the cause. The claim was also made that the commission was a judicial tribunal and was not subject to be restrained by an injunction from a Federal court.

After the allowance of the temporary restraining order in the Fleischmann case, various banks in which the commission had deposited to its credit dispensary funds were made parties defendant, and enjoined from paying out such funds except upon the order of the court. Subsequently, in the same case, after a hearing on January 29, 1908, upon the rule to show cause, an order was entered on March 2, 1908, continuing the temporary restraining order until the final determination of the suit. The motion for the appointment of a receiver was, however, continued without prejudice. The opinion of the court is reported in 161 Fed. Rep. 152. A like order was also cotemporaneously entered in the Wilson case, and in that case, likewise, an order was entered on March 5, 1908, making the banks who had the dispensary funds on deposit parties defendant, and restraining them from paying them out. In this connection it is to be remarked that the banks who were thus restrained in both cases, as security for the dispensary funds placed with them by the commission, had each delivered to that body bonds, stock and other collaterals, and the same had been by the commission deposited in the state treasury.

After the submission and before the court had decided the rules to show cause the legislature of South Carolina passed two statutes concerning the state dispensary fund. By the first the winding up act of 1907 was amended by increasing the compensation of the commission, by directing the sale of the dispensary real estate, etc., and the payment out of the fund of a certain judgment for damages. The eleventh section of the act was amended so as to read as follows:

"SEC. 11. That said commission is hereby declared to possess full power to pass upon, fix and determine all claims against the State growing out of dealings with the dispensary, and to

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pay for the State any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been, or may hereafter be collected by said State dispensary commission: *Provided*, That each and every person, firm or corporation presenting a claim or claims to said commission shall have the right to appeal to the Supreme Court as in cases at law: *Provided further*, That notice of intention to appeal shall be served upon said commission within ten days of rendition of judgment by the said commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals to the Supreme Court." Laws 1908, p. 1289.

By the second act the commission was directed to pay fifteen thousand dollars into the state treasury, to be used for the expenses of criminal prosecutions for violations of the laws relating to "the late institution called the State dispensary." The commissioners refused to pay out of the dispensary funds in their hands the fifteen thousand dollars directed by the last-mentioned statute, on the ground that they were under an injunction from the Circuit Court of the United States. Thereupon the attorney general of the State began proceedings by mandamus in the Supreme Court of South Carolina to compel compliance with the act. The case was decided on March 14, 1908. The court, in an elaborate, careful and perspicuous opinion, reviewed the dispensary legislation, expressly held that the statutes governing the same made the State the purchaser of the liquors bought for consumption, and, therefore, that those who had sold the liquor to the state dispensary had contracted with the State, and with the State alone; that all the assets and property of the dispensary belonged to the State, and that the commissioners appointed to wind up and liquidate its affairs were state officers, entrusted with a public duty on behalf of the State. As a result of these conclusions it was determined that the Circuit Court of the United States was without jurisdiction to enjoin the commissioners as state officers from disposing of the state property as the state statute di-

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rected, and therefore a right existed to a peremptory mandamus. The issuing of the peremptory writ, however, was left in abeyance, the court—doubtless for the purpose of avoiding an unseemly conflict with the Circuit Court—saying that it would not assume "that the construction which it has placed upon the state constitution and the statutes in question will be disregarded by the Federal court." 79 S. Car. 316. A few days before this decision was announced, and in consequence of representations made to the Circuit Court that a bill had been introduced in the general assembly of South Carolina directing the commission to turn into the state treasury the dispensary funds, the Circuit Court appointed the members of the commission temporary receivers of the fund, with directions to hold the same subject to the orders of the court. Subsequently, on March 9, 1909, the Circuit Court entered an order, consolidating the two causes, and appointing three persons receivers of the dispensary fund, two of those thus appointed being at that time, or having been shortly prior thereto, members of the commission.

Following the decision of the Supreme Court of South Carolina in the case last referred to, and on March 27, 1908, the defendants in the consolidated causes filed a motion "for an order revoking the former orders of the said court, granting an injunction and appointing receivers, on the ground that the Supreme Court of South Carolina has now construed the statutes of South Carolina and the constitution of the said State, under which the complainants claim their rights, and has construed it differently from the said Circuit Court's construction which construction, if followed, ousts the jurisdiction of the Circuit Court." The motion was denied. 161 Fed. Rep. 162. Thereafter the Wilson Distilling Company, by leave, filed in the consolidated cause an amendment to its bill, setting up the claim that the "acceptance by the defendants constituting the said dispensary commission, as trustees, of the trust created by said act [of February 16, 1907], and the acceptance by the complainants and the other creditors of said State dispensary, as *cestuis*

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*que trust*, of the benefits of the trust so created, constituted a valid, binding and irrepealable contract within the meaning and protection of the Constitution of the United States, and of article 1, section 10, thereof, the protection whereof is hereby expressly claimed by your orators." Following said averment it was alleged that the act approved February 24, 1908, heretofore referred to, was repugnant to Art. I, § 10, of the Constitution of the United States, and to the Fourteenth Amendment, "for that same impairs and attempts to impair the obligation of the contract set out in the last preceding paragraph hereof, and deprives and attempts to deprive the complainants of their property without due process of law, and denies, and attempts to deny, to them the equal protection of the law, in violation of the aforesaid provisions of the Constitution of the United States," In a separate paragraph it was averred that the object and purpose of the institution of the mandamus suit in the state court "was to hinder, delay and defeat the enforcement by this court of the trust created by said act of 1907, and the administration of said trust by this court in the above-entitled causes." The Circuit Court on its own motion made an order directing the payment to the attorney general of South Carolina of the sum of fifteen thousand dollars upon his application therefor, and modified the former orders of the court to the extent necessary to permit the receivers to make such payment.

To reverse the interlocutory orders granting an injunction *pendente lite* and appointing receivers, an appeal was prosecuted to the Circuit Court of Appeals for the Fourth Circuit by the three members of the commission then in office, officially and individually, and by certain of the banks which had been made defendants. The Circuit Court of Appeals on September 15, 1908, affirmed the action of the lower court. 162 Fed. Rep. 1. This writ of certiorari was thereupon allowed.

Underlying all the contentions made in the cause is the fundamental question whether the suits were in substance suits against the State, and therefore beyond the jurisdiction of the

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Circuit Court, because of the express prohibition of the Eleventh Amendment. As that question is the pivotal one, we come at once to its consideration.

If we consider as an original question the provisions of the constitution of South Carolina on the subject and the terms of the statutes of that State establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers, or agents, of liquor for consumption in South Carolina, were purchases made by the State for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the State and the persons who sold the liquor. And this irresistible conclusion, arising from the very face of the constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance* v. *Vandercook, No. 1, supra,* and by the construction given by the Supreme Court of South Carolina to the state statute prior to the commencement of this litigation, in *State* v. *Farnum, supra,* as well as by the convincing opinion expressed by that court in reviewing the state statutes in the mandamus case already referred to as reported in 79 S. Car. 316.

We could not therefore sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the State can be compelled by compulsory judicial process to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a court of the United States. Thus, in *Hagood* v. *Southern,* 117 U. S. 52, where, in suits brought in a court of the United States against officers and agents of the State of South Carolina, the holders of certain revenue scrip of the State endeavored to enforce the redemption thereof according to the terms of the statute, in pursuance of which the scrip was issued, which statute was al-

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leged to constitute an irrepealable contract, the court said (p. 87):

"Though not nominally a party to the record, it [the State] is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.' "

In the subsequent case of *Christian* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, by bill in equity, filed in a court of the United States, it was attempted to reach dividends on the stock of the defendant railroad company, and apply such dividends to the payment of the bonds issued by the State of North Carolina, and for the sale of stock owned and held by the State. It was contended for the complainants that the proceeding was *in rem* against the stock to enforce a right in and to it resulting from an alleged contract by which the stock was pledged for the benefit of the complainants, although the stock was not actually delivered to the alleged pledgee. It was held that the mere declaration by the State in a statute that stock held by it was pledged did not technically operate to create a pledge. Upon the hypothesis that a mortgage of the stock might have been effected, it was said (p. 243):

"The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such pro-

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ceeding can be maintained. The mortagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the Eleventh Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Louisiana* v. *Jumel*, 107 U. S. 711; *Parsons* v. *Marye*, 114 U. S. 325; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443."

The complainants below, however, insist that if it be conceded that under the state dispensary statutes the relation of the State and the sellers of liquor was that of debtor and creditor, the general assembly of South Carolina in the winding up act of 1907 intended to and did alter that relation, because the State, by that act, renouncing its control over the assets of the state dispensary, vested the commission with the title to such assets as trustees of an express trust, and constituted the creditors of the State who had furnished supplies for the use of the dispensary the beneficiaries of such trust. The argument being that hence the suits are not against the State, and therefore are not within the inhibition of the Eleventh Amendment. It cannot be and is not denied that the construction of the winding up act, upon which the contention rests, is contrary to that entertained both by the general assembly of South Carolina and by the highest court of the State, but it is urged that the statutes of 1908, in respect to the dispensary fund and the opinion of the Supreme Court were, the former enacted and the latter announced after this litigation was commenced. But if we assume that the legislation and decision referred to are not controlling, yet they are persuasive. Aside from this, however, considering the text of the winding up act, we are of opinion that there is no just ground for the conclusion that the State, in providing by that legislation for the liquidation of the affairs

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of the state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the State as to authorize a judicial tribunal to take the assets of the State out of the hands of those selected to manage the same, and by means of a receiver to administer such assets as property affected by a trust, irrevocable in its nature, and thus to dispose of the same without the presence of the State.

An interpretation of the act in question, producing such an abnormal and extraordinary result as that just stated, cannot be adopted merely because it might be sustained by strained implications. On the contrary, such interpretation could only be warranted if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction. Coming to consider the act, it is patent that neither by express language nor by necessary implication does it convey the meaning which the proposition seeks to give to it. In form the winding up statute is but an ordinary act of legislation, providing, in the interest of the State, for an examination and liquidation of the claims against the dispensary and their payment out of the state assets when liquidated, so as to secure the State against unjust claims and preserve its interest in the fund. The act does not, in express terms, make any change in the theretofore existing relation of debtor and creditor between the State and the vendors of liquor under the state dispensary act. The conception that an irrevocable trust was intended to be created is negatived by the requirement in the first section, for the giving by each member of the commission of a bond for the sum of ten thousand dollars, conditioned for the faithful performance of the duties imposed. So also the wide discretion vested in the commission by § 3, empowering it to arrive at a determination as to the legality of purchases of liquor previously supplied by a full investigation of the circumstances "surrounding all contracts for liquors," and subjecting to the approval of the attorney

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general of the State the employment of counsel to make such investigation, precludes the inference of an intention on the part of the general assembly to terminate its control over the fund. And the fact that the legislature deemed that the statute was but an ordinary act of legislation over a subject designed to be continued within legislative control is, we think, clearly manifested in the eighth section of the act, which reads as follows:

"SEC. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation (27) of the dispensary, approved January 24th, A. D. 1906, be and hereby is, conferred upon the commission provided for under this act; provided, that for purposes of the investigation of the affairs of the dispensary as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission."

The absence in the winding up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the State had abandoned all property right in the funds placed in the hands of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the State to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the State for that purpose. And it is elementary that even if a State has consented to be sued in its own courts by one of its creditors, a right would not exist in such creditor to sue the State in a court of the United States. *Smith* v. *Reeves*, 178 U. S. 436, and cases cited; *Chandler* v. *Dix*, 194 U. S. 590. The situation, therefore, was not changed as a result of the subsequent act of February 24, 1908, giving the creditors of the State,

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whose claims might be adversely acted upon by the commission, the right to a review in the Supreme Court of the State.

The decision of the questions arising upon this record relating, as they do, to rights and remedies of a mere contract creditor of the State of South Carolina, is not in anywise controlled by the ruling in *South Carolina* v. *United States*, 199 U. S. 437, where, although recognizing that official dispensers of liquors under the laws of South Carolina were agents of the State, it was held (p. 463) "that the license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are the agents of the State, which has itself engaged in that business." That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a preëxisting right of taxation possessed by the Government of the United States. The ruling in this case but enforces an exemption of the State from suit in the courts of the United States upon its contract debts, an exemption which existed by virtue of the Constitution of the United States at the time when the legislation was enacted out of which the alleged contracts arose.

Deciding as we do that the suits in question were suits against the State of South Carolina, and within the inhibition of the Eleventh Amendment, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause remanded to that court with instructions to dismiss the bills of complaint.

*And it is so ordered.*

THE CHIEF JUSTICE took no part in the consideration or disposition of this case.

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# MURRAY, McSWEEN, AND PATTON, AS THE STATE DISPENSARY COMMISSION, *v.* STATE OF SOUTH CAROLINA *ex rel.* RAY, TRUSTEE.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 605. Argued February 26, March 1, 1909.—Decided April 5, 1909.

*Murray* v. *Wilson Distilling Co.*, *ante*, p. 151, followed as to the Federal questions involved in this proceeding.

THE facts are stated in the opinion.

*Mr. W. F. Stevenson*, with whom *Mr. D. S. Matheson* was on the brief, for plaintiffs in error.

*Mr. D. C. Ray*, for defendants in error, submitted.

MR. JUSTICE WHITE delivered the opinion of the court.

This is a proceeding in mandamus commenced in the Supreme Court of the State of South Carolina to compel the commission appointed under the authority of the act of the general assembly of that State, approved February 16, 1907, providing for the winding up of the affairs of the state dispensary, to comply with an act of the general assembly, approved February 24, 1908, requiring the payment of a certain judgment out of the funds in the hands of the commission. It was set up in justification of the refusal to obey the command of the statute that the commission was restrained and enjoined from paying out the fund by orders of the Circuit Court of the United States, made in the suits of the Wilson Distilling Company and the Fleischmann Company, the validity of which orders was the subject of consideration in the case of *Murray* v. *Wilson Distilling Company*, No. 625, this term, just decided. Upon the authority of the decision in *State ex rel.*

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*J. F. Lyon* v. *W. J. Murray and others*, 79 S. Car. 316, the Supreme Court of South Carolina held that the return of the commission was insufficient, and ordered a peremptory mandamus to issue. A writ of error was thereupon prosecuted from this court, upon the theory that the court below had declined to give full faith and credit to the orders and decrees of the Circuit Court of the United States in the cases mentioned.

The determination of the questions of a Federal nature, arising in this case, is controlled by the decision made in *Murray* v. *Wilson Distilling Company*, No. 625, this term, *ante*, p. 151, heretofore referred to, and, upon the authority of that decision, the judgment of the Supreme Court of South Carolina is

*Affirmed.*

THE CHIEF JUSTICE took no part in the consideration or disposition of this case.

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## SILER *et. al.*, CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 521. Argued February 24, 25, 26, 1909.—Decided April 5, 1909.

Where the Federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction, and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the Federal questions or deciding them adversely to the party claiming their benefit.

Where the bill not only alleges that the statute creating the commission, but also the order of the commission sought to be enjoined, deprives complainant of its property without due process of law, and also violates other provisions of the Constitution, the Circuit Court obtains

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jurisdiction without reference to the particular violation of the Fourteenth Amendment. *Barney* v. *City of New York*, 190 U. S. 430, distinguished.

The rule of this court is not to decide constitutional questions if the case can be decided without doing so; and when, as in this case, it can dispose of the case by construction of the statute and on the lack of authority given by such statute to make the order complained of, it will do so rather than on the constitutional questions involved.

Jurisdiction so extensive as to place in the hands of a commission power to make general maximum rates for all commodities between all points in the State is not to be implied, but must be given in language admitting no other reasonable construction, and this power cannot be found in the Kentucky Railroad Commission Act.

Notwithstanding the highest court of the State has not yet construed the statute involved, this court must, in a case of which it has jurisdiction, construe it.

The fact that the legislature of a State gives to a railroad commission no power to raise rates, but only power to reduce rates found to be exorbitant after hearing on specific complaint, is an argument against construing the statute so as to give the commission power to fix maximum rates on all commodities.

Where a railroad commission after a hearing on specific complaint as to a rate on a particular commodity makes a general rate tariff for maximum rates on all commodities which is beyond its statutory power, the whole tariff falls, and the rate on the tariff on the particular commodity will not be separately sustained.

The Kentucky railroad commission having, after a hearing on complaints that the rates on lumber were too high, attempted to impose a general maximum intrastate tariff schedule, and the statute creating the commission not giving it authority to make such a schedule, this court, without deciding whether either the statute or the order deprives the railroad companies of their property without due process of law, holds that the entire schedule of rates including those on lumber must fall as being beyond the jurisdiction of the commission to establish in that manner.

THE Louisville and Nashville Railroad Company, hereinafter called the company, filed its bill July 25, 1906, in the Circuit Court of the United States for the Eastern District of Kentucky, to enjoin the enforcement of a certain order made by the railroad commission of Kentucky (hereafter called the commission), providing what are termed maximum rates on

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the transportation of all commodities upon the railroad of the company to and from all points within the State. In its bill the company contended that the order as to rates of transportation was void, because it was, upon several stated grounds, in violation of certain named provisions of the Constitution of the United States, among them being the claim that the rates were so low as to be confiscatory. It was also contended that the statute was an interference, in its results, with interstate commerce. The company also contended (among other objections not of a Federal nature) that the commission had no power to make the order in question under a correct and proper construction of the state statute of March 10, 1900, under which the commission assumed to exercise the power to fix the rates provided for in its order.

The Circuit Court decided that such act, hereinafter fully set forth and called the "McChord Act," and also the order of the railroad commission of Kentucky complained of, irrespective of any claim that such order was confiscatory, violated the provisions of § 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any State from depriving any person of property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws, and that the order of the commission, so far as it was applicable to the company, was, therefore, null and void, and the special commissioner who had been appointed to take evidence in the case as to the character of the rates, and other matters, was directed to so report. (The court decided the case upon the authority of *Louisville &c. R. R. Co.* v. *McChord*, 103 Fed. Rep. 216, reversed on other grounds, 183 U. S. 483.)

A final decree having been made pursuant to the decision of the court, the commission appealed directly to this court from such decree. The proceedings which led up to the decree from which the commission has appealed, without the court passing upon the allegation of the confiscatory nature of the rates, were by means of a stipulation made in order to facilitate matters,



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by reason of which the court decided as matter of law the order and act were both invalid, and it perpetually enjoined the enforcement of the order as to rates as well as the procuring of indictments against the officers of the company or the company itself.

The appellants disputed the jurisdiction of the Circuit Court upon the grounds which are particularly stated in the opinion herein, and they took issue on many of the material allegations contained in the bill of complaint.

The facts upon which the questions in this case arise are as follows: The company was duly incorporated under an act of the general assembly of the State of Kentucky, approved March 5, 1850. It has a large mileage, amounting to over 1,200 miles within the State, and it operates its road within the State in connection with other portions of its road in other States, having altogether in Kentucky and such other States a mileage of over 4,000 miles. It claims to have a contract right to fix rates as provided in its charter, and it contends that the order of the commission violates that right as well as other rights protected by the Federal Constitution.

The State adopted a new constitution on the twenty-eighth day of September, 1891, by § 209 of which the present railroad commission of the State was established.

It is asserted by the company, though such assertion is denied, that up to March 10, 1900, the commission or its predecessors had not been empowered by constitutional or statutory provision to regulate or fix the rate of compensation which a railroad company might charge for the service of transporting freight or passengers over its lines in the State. On the above-mentioned date the general assembly enacted what is generally called the "McChord Act," which is set forth in full in the margin.[1]

[1] An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés, from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase

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The act has not been construed by the Court of Appeals, the highest court of the State of Kentucky, upon the question

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and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act, and penalties for the violation of its provisions.

SEC. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting, or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction in any sum not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The Circuit Court of any county into or through which the

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hereinafter discussed, nor has it been held valid as to all of its provisions, with regard to the constitution of the State or of the United States by any court, state or Federal.

After its passage, and in December, 1904, and January and February, 1905, one Guenther, a citizen of Owensboro, Kentucky, made complaints to the commission, in which he complained generally (but without specifying any in particular) that the rates charged by the company, and also by the Illinois Central Railway, and the Louisville, Henderson and St. Louis Railway Company, on interstate freight to and from Owensboro, as compared with the rates on like freight to and from Evansville, Indiana, and on *intrastate freight* to and from points in Kentucky to and from Owensboro, were unjust and unreasonable. A petition in regard to interstate rates was subsequently filed with the Interstate Commerce Commission, where it is still pending and undetermined. As to regulating the local rates complained of, the commission then made no finding.

Afterwards, Guenther prepared an amended complaint, which was filed with the commission some time early in September, 1905, in which this company and all the other railroad companies operating lines in the State of Kentucky were made

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line or lines of road carrying such passenger or freight owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé shall have jurisdiction in all prosecutions against said officer, agent or employé.

SEC. 3. Prosecutions under this act shall be by indictment.

SEC. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasury for its payment.

Approved March 10, 1900, Acts p. 5, ch. 2.

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defendants, and wherein it was alleged, in substance (and again without any details), that all local freights from and to all local points in the State of Kentucky, as fixed and charged by the defendant railroad companies on all classes of freight, were excessive, discriminatory and extortionate, and he prayed the commission to revise and adjust the rates, not only in and out of Owensboro, but to revise and adjust the rates between all local points from and to every local point throughout the State of Kentucky.

Subsequently, on the fourteenth of September, 1905, three lumber companies of Louisville, Kentucky, tendered their petition to be made parties to the Guenther proceedings then pending, and they adopted the general language of his complaint with respect to all local rates in the State, and they added complaints in regard to the rates on logs, lumber and cross ties.

On the third of October, 1905, the State of Kentucky, through certain attorneys, filed a petition to intervene on the part of the State in the Guenther proceedings, and sought to make the State a party complainant against all the railroad companies as defendants operating lines in the State. The petition was opposed by the company on the ground that the State had no standing in the proceedings, and certainly none by the attorneys named, but it was granted, and the State intervened as prayed for, and was made a party complainant so that it might prosecute the proceedings against the company and all the other carriers made defendants therein. The proceedings against the various railroad companies within the State were subsequently consolidated before the commission.

Before answering the complaints of Guenther, the lumber companies and the State of Kentucky against the defendant company and the other railroad companies in that State, the company, in this case, duly objected to the proceedings before the commission on various grounds, among them that the complaint did not state facts sufficient to constitute a cause of action against the company, and on the ground that the complaints were not sufficiently definite and specific, and that the com-

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plaints should show specifically what rates are claimed to be exorbitant, excessive or extortionate, or what commodity or which communities the rates of the company discriminate against.

An objection was also duly and in season made that the commission had no power to fix a general maximum rate or rates for all commodities from and to all points within the State, but that specific complaint should be made as to the particular rates complained of. The commission ruled that the entire subject of railroad rates was before it, and decided to proceed with its investigation of such rates on all railroads and between all places and on all classes of commodities within the State of Kentucky.

By virtue of the complaints above adverted to the proceedings against substantially all the railroad companies of the State were then continued, and the commission heard and decided the question of rates relating to this company, and some, but not all, of the other roads in the State.

The commission subsequently, and on July 20, 1906, promulgated its order making schedules for "Maximum Rates on Freight," and it applied one schedule, called "Kentucky Railroad Commission's Standard Tariff, No. 1," to this company and four other companies within the State, although in the case of one of the four (the Chesapeake and Ohio Railroad Company) no notice of such tariff was ever served upon it. Another schedule, called "Kentucky Railroad Commission's Standard Tariff, No. 2," applied to the Illinois Central Railroad Company alone, and the commission left several railroad companies untouched by either of such schedules, or by any schedule, although they were defendants in this proceeding. In its opinion the commission stated as follows: "The several complaints, which for convenience have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates for the transportation of all commodities upon all railroads to and from all points within the State."

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*Mr. C. C. McChord* and *Mr. R. H. Winn*, with whom *Mr. James Breathitt*, Attorney General of the State of Kentucky, was on the brief, for appellants:

The averment that the statute herein involved did not confer upon the commission the power to fix the rates complained of, took out of the case all basis of a claim of Federal jurisdiction. *Louisville* v. *Cumberland Tel. Co.*, 155 Fed. Rep. 729; *Barney* v. *New York*, 193 U. S. 437; *S. C.*, 132 Fed. Rep. 901; *S. C.*, 138 Fed. Rep. 184; *Raymond* v. *Chicago*, 207 U. S. 20.

The statute sought to be condemned clothes the commission with the power of establishing just and reasonable rates, a function which can be conferred by the legislature, whether empowered by the constitution of the State or not, and which is rather an adjunct to the legislative, than the judicial power.

A judicial hearing is not necessary to the fixing of a rate. *Railroad Co.* v. *Minnesota*, 134 U. S. 418; *Fitts* v. *McGhee*, 172 U. S. 516; *Railroad Co.* v. *Nebraska*, 170 U. S. 57; *State* v. *Railroad*, 33 Kansas, 176; *N. Y. Health Dept.* v. *Trinity Church*, 145 N. Y. 32; *San Diego* v. *Nat'l City*, 174 U. S. 740; *Railroad Co.* v. *Board of Commrs.*, 78 Fed. Rep. 258.

Making a rate is not a judicial function. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Atl. C. L.* v. *North Carolina*, 206 U. S. 20; *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Trust Co.*, 154 U. S. 362; *Lake Shore* v. *Smith*, 173 U. S. 684; *Railroad Co.* v. *Gill*, 156 U. S. 664; *Railroad Co.* v. *Wellman*, 143 U. S. 339; *Railroad Co.* v. *Blake*, 94 U. S. 180; *Munn* v. *Illinois*, 94 U. S. 113; *Stone* v. *Trust Co.*, 116 U. S. 307; *Storrs* v. *Railroad*, 29 Florida, 617; *Ga. Railroad Co.* v. *Smith*, 128 U. S. 174; *Dow* v. *Beidelman*, 125 U. S. 680; *Budd* v. *New York*, 143 U. S. 517; *Cov. Turnpike Co.* v. *Sanford*, 164 U. S. 578.

The Kentucky act of March 10, 1900, does not confer judicial power on the commission, and the making of a rate is not the enforcement of a judgment or the infliction of a penalty. *McChord* v. *L & N.*, 183 U. S. 483; *L. & N. R. R. Co.* v. *Commonwealth*, 183 U. S. 505; *West. Un. Tel. Co.* v. *Myatt*, 98 Fed. Rep. 341, 345; *State* v. *Johnson*, 60 Pac. Rep. 1068; *Railroad*

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*Co.* v. *Inters. Com. Com.*, 162 U. S. 184; *Inters. Com. Com.* v. *Railroad Co.*, 167 U. S. 507; *Inters. Com. Com.* v. *Railroad Co.*, 168 U. S. 144; *State* v. *Wilson*, 28 S. E. Rep. 554.

The act is not unconstitutional because it does not expressly provide for a judicial investigation or a hearing as to the reasonableness of the rate after it is fixed. *Prentis* v. *Atl. C. L.*, 211 U. S. 210; *Fitts* v. *McGhee*, 172 U. S. 516; *Railroad Co.* v. *Minnesota*, 134 U. S. 418; *Railroad Co.* v. *Trammel*, 53 Fed. Rep. 197.

The act of March 10, 1900, does not violate the state constitution. *L. & N.* v. *Commonwealth*, 46 S. W. Rep. 707; *Pennington* v. *Woolfolk*, 79 Kentucky, 13; *Stone, Auditor*, v. *Wilson*, 19 Ky. Law Rep. 126; *Morton* v. *Woolford*, 99 Kentucky, 367.

A state statute relating to commerce is presumed to relate only to domestic commerce in absence of an expressed relation to interstate or foreign commerce. *L. & N.* v. *Kentucky*, 183 U. S. 505; *Munn* v. *Illinois*, 94 Illinois, 113, *Stone* v. *Trust Co.*, 116 U. S. 307; *Wabash R. R.* v. *Illinois*, 118 U. S. 557; *Railroad Co.* v. *Jones*, 149 Illinois, 384; Endlich on Interp. of Stat., § 169.

This is but an exemplification of the general rule which presumes statutes to be constitutional. *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Trust Co.*, 154 U. S. 362; *Railroad Co.* v. *Smith*, 173 U. S. 684; *Railroad Co.* v. *Wellman*, 143 U. S. 339; *Southern Pac.* v. *R. R. Com.*, 78 Fed. Rep. 236; *Railroad Co.* v. *Tompkins*, 176 U. S. 173.

The bills of complaint do not claim that there is no state commerce. That there is such is settled beyond question. *Railroad* v. *Lander*, 20 Ky. Law Rep. 913; *Railroad Co.* v. *Mississippi*, 133 U. S. 587; *Railroad Co.* v. *Pennsylvania*, 145 U. S. 192; Tiedeman on State and Fed. Control, 1056; *Plassey* v. *Ferguson*, 163 U. S. 537; *Stone* v. *Trust Co.*, 116 U. S. 307; *C. & O. R. R.* v. *Kentucky*, 179 U. S. 388.

That state and interstate commerce may be intermingled, and have a close relation one to the other, does not prevent the State from controlling that which is state or domestic com-

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merce. *Smyth* v. *Ames*, 169 U. S. 466; *Railroad Co.* v. *Tompkins*, 176 U. S. 167; *Reagan* v. *Trust Co.*, 154 U. S. 362.

There are no excessive or cumulative penalties for second, third and succeeding convictions under the act of March 10, 1908. 12 Cycl. Law & Pro. 949; *Brown* v. *Kentucky*, 100 Kentucky, 127; *S. C.*, 37 S. W. Rep. 496; *Wilson* v. *Kentucky*, 26 Ky. Law Rep. 685; *Standard Oil Cases*, 87 S. W. Rep. 1092, 1131; *S. C.*, 29 Ky. Law Rep. 20; *Cawein* v. *Kentucky*, 22 Ky. Law Rep. 1736; *Parish* v. *N. C. & St. L. Ry.*, 49 Am. Rep. 655; *S. C.*, 13 Am. & Eng. Ency. of Law (2d ed.), 65; *Ex Parte Snow*, 120 U. S. 274.

The essential elements of "due process" are reasonable notice and a fair opportunity to be heard. *Davison* v. *New Orleans*, 96 U. S. 102; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272; *Dent* v. *West Virginia*, 129 U. S. 114; *Iowa Cent. R. R.* v. *Iowa*, 204 U. S. 255; *Wilson* v. *North Carolina*, 169 U. S. 586; *Hurtado* v. *California*, 110 U. S. 535; *Paulson* v. *Portland*, 149 U. S. 41; *Hibben* v. *Smith*, 191 U. S. 393; *L. & N.* v. *Schmidt*, 177 U. S. 236.

The State may distinguish, select and classify objects of legislation without denying equal protection of the laws. *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 209; *Barbier* v. *Connolly*, 113 U. S. 32; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Ky. Ry. Tax Cases*, 115 U. S. 322; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *Orient &c.* v. *Daggs*, 172 U. S. 562; *New York &c.* v. *Bristol*, 151 U. S. 571.

That a different rate may be made for different roads constitutes neither arbitrary power nor unjust discrimination, so long as the rule by which the rates are fixed is uniform. *Reagan* v. *Trust Co.*, 154 U. S. 362; *Railroad Co.* v. *Tompkins*, 176 U. S. 167; *Smyth* v. *Ames*, 169 U. S. 540, 547; *S. C.*, 64 Fed. Rep. 165; *Cov. Turnpike* v. *Sanford*, 164 U. S. 578; *Munn* v. *Illinois*, 94 U. S. 113; *Railroad Co.* v. *Gill*, 156 U. S. 664; *Railroad Co.* v. *Minnesota*, 134 U. S. 418; *Railroad Co.* v. *Iowa*, 94 U. S. 164; *Stone* v. *Trust Co.*, 116 U. S. 307; *Storrs* v. *Railroad Co.*, 29 Florida, 617; *S. C.*, 11 So. Rep. 227; *Ruggles* v. *Illinois*,

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108 U. S. 526; *Budd* v. *New York*, 143 U. S. 517; *Commonwealth* v. *Cov. Bridge*, 14 Ky. Law Rep. 836.

Classification proceeding on any difference which has a reasonable relation to the subject-matter sought to be accomplished is unobjectionable, though inequality results. Railroads have always formed a separate and distinct class. *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Barbier* v. *Connolly*, 113 U. S. 27; *Williams* v. *Mississippi*, 170 U. S. 214; *Grundling* v. *Chicago*, 177 U. S. 183; *Budd* v. *New York*, 143 U. S. 517; *Dow* v. *Beidelman*, 125 U. S. 680; *Magoun* v. *Trust Co.*, 170 U. S. 282; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 560; *Railroad Co.* v. *McKee*, 127 U. S. 205; *Railroad Co.* v. *Beckwith*, 129 U. S. 26; *Bowman* v. *Lewis*, 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The police power of the State relating to the regulation of the rates of common carriers cannot be bargained away. *L. & N. R. R.* v. *Kentucky*, 183 U. S. 505; *Stone* v. *Mississippi*, 101 U. S. 814; *Douglas* v. *Commonwealth*, 168 U. S. 488; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *L. & N. R. R.* v. *Kentucky*, 161 U. S. 677; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *N. O. Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Mugler* v. *Kansas*, 123 U. S. 623; *Slaughter House Cases*, 111 U. S. 746; *Ruggles* v. *Illinois*, 108 U. S. 536; *New Jersey* v. *Yard*, 95 U. S. 104; *Stone* v. *Trust Co.*, 116 U. S. 307; *Railroad Co.* v. *Illinois*, 146 U. S. 387; *Railroad Co.* v. *Nebraska*, 170 U. S. 57; *Railroad Co.* v. *Bristol*, 151 U. S. 556; *Railroad Co.* v. *Defiance*, 167 U. S. 88; *Pearsall* v. *Railroad Co.*, 161 U. S. 648; *Railroad Co.* v. *Transp. Co.*, 25 W. Va. 324.

For a charter provision to amount to an irrevocable contract fixing rates for all time, it must be clear, to the exclusion of a reasonable doubt, and must contain words exempting the corporation from future control. Merely to fix a maximum rate in the charter is not sufficient. Tiedeman on State and Federal Control, 952, 955; Russell on Police Powers, 127, 128; *Cent. Transp. Co.* v. *Pullman*, 139 U. S. 49; *Minott* v. *Railroad Co.*, 18 Wall. 204; *Bailey* v. *Magwire*, 22 Wall. 215; *Stone* v. *Wis-*

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*consin*, 94 U. S. 181; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Ruggles* v. *Illinois*, 108 U. S. 536; *S. C.*, 91 Illinois, 262; *Railroad Co.* v. *Illinois*, 108 U. S. 541; *Stone* v. *Trust Co.*, 116 U. S. 307, 347; *Banking Co.* v. *Smith*, 128 U. S. 174; *Railroad Co.* v. *Minnesota*, 134 U. S. 418, 467; *Smyth* v. *Ames*, 169 U. S. 466; *Turnpike* v. *Sanford*, 164 U. S. 578; *Commonweath* v. *Covington Bridge*, 21 S. W. Rep. 1042; *Railroad Co.* v. *Miller*, 132 U. S. 75; *Winchester Turnpike Co.* v. *Croxton*, 98 Kentucky, 739; *Ragan* v. *Aiken*, 9 Lea (Tenn.), 610; *Water Co.* v. *Fergus*, 178 Illinois, 571; *Danville* v. *Water Co.*, 178 Illinois, 399; *S. C.*, 53 N. E. Rep. 118; *S. C.*, 180 Illinois, 235; *S. C.*, 54 N. E. Rep. 224; *Water Co.* v. *Freeport*, 57 N. E. Rep. 862.

A reservation of the right to alter, amend or repeal, expressed either in a general law or in the charter prevents a provision from becoming an irrevocable contract. Tiedeman on State and Federal Control, 980; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636.

*Mr. Henry Lane Stone*, for Louisville & Nashville Railroad Company:

The ruling of the court below sustaining its jurisdiction was correct. The allegations of the amended bill bring the case within the decision of this court in *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20.

The principle is well settled that where a Circuit Court of the United States once obtains jurisdiction of a cause, it may proceed to determine all questions involved therein, whether state or Federal. *Osborne* v. *Bank of United States*, 9 Wheat. 822, 823; *Elliott* v. *Peirsol*, 1 Pet. 340; *Mayor* v. *Cooper*, 6 Wall. 252; *Tennessee* v. *Davis*, 100 U. S. 264; *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 141; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 154; *Omaha Horse Ry. Co.* v. *Cable Tram-Way Co.*, 32 Fed. Rep. 727, 729; *People's Savings Bank* v. *Layman*, 134 Fed. Rep. 635, 641; *Michigan R. R. Tax Cases*, 138 Fed. Rep. 223, 230.

The decree appealed from, therefore, should be affirmed, and

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it may be upheld and sustained upon any of the grounds relied on by appellee whether or not they arise under the Constitution and laws of the United States.

As the McChord Act undertakes to vest in the railroad commission, an administrative body, legislative, executive and judicial powers, it violates §§ 27, 28, 109 and 135 of the Kentucky constitution and is, therefore, unconstitutional. *Louisville & Nashville Railroad Co.* v. *McChord*, 103 Fed. Rep. 222; *Roberts* v. *Hackney*, 109 Kentucky, 265; *Pratt* v. *Breckinridge*, 114 Kentucky, 1; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 495; *Interstate Commerce Commission* v. *Cin., N. O. & Texas Pacific Ry. Co.*, 167 U. S. 499.

Neither the said statute nor any other Kentucky statute provides for any judicial investigation or review on the reasonableness of any rate fixed by the commission for services of a carrier thereafter to be rendered, before the carrier is required to put them into force and effect. The making of such order conclusive as to the sufficiency of the rate fixed, deprives the carrier of its property without due process of law, and denies it the equal protection of the law, in violation of the Fourteenth Amendment. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 458; *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S. 399; *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. Rep. 224; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 172; *Smyth* v. *Ames*, 169 U. S. 518; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 381; *Hagar* v. *Reclamation District*, 111 U. S. 708; *Davidson* v. *New Orleans*, 96 U. S. 107; *Hovey* v. *Elliott*, 167 U. S. 418; *Violett* v. *Alexandria*, 92 Virginia, 561, 569; *Ex parte Young*, 209 U. S. 123; *Louisville & Nashville R. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132; *Roller* v. *Holly*, 176 U. S. 409.

The McChord Act does not in its title or provisions authorize the commission to prescribe and establish schedules of maximum rates or tariffs, as is attempted by the order of July 20, 1906. The principal object of the act was to amend § 816, Kentucky statutes, which had been held by the Court of Appeals

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to be unconstitutional and void, *L. & N. R. R. Co.* v. *McChord*, 99 Kentucky, 132, and there is no suggestion looking to the granting of power to the commission to make schedules of maximum rates. It is impossible to conceive that the legislature would require a road like the Louisville & Nashville with 1,300 miles of road and 700 stations to publish and put into force a rate schedule in ten days. The legislature is presumed to have had before it the acts of other States creating railroad commissions and defining their powers, and apt and clear language would have been employed, if it had been the intention to clothe the commission with this important and far-reaching power. No railroad commission of any State has ever assumed such power except where expressly granted.

Powers of railroad commissions are limited, and the statutes granting such powers must be strictly construed. *Chicago, I. & L. Ry. Co.* v. *R. R. Commissioners of Indiana*, 38 Ind. App. 439; *State* v. *Chicago, M. & St. P. Ry. Co.*, 16 S. D. 517; *S. C.*, 94 N. W. Rep. 407; *Board of R. R. Commrs.* v. *Oregon Ry. & Nav. Co.*, 17 Oregon, 65; *S. C.*, 19 Pac. Rep. 702; *Interstate Com. Comm.* v. *C., N. O. & T. P. Ry. Co.*, 167 U. S. 479; *Chicago, B. & Q. Ry. Co.* v. *Dey*, 38 Fed. Rep. 656; *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. Rep. 216.

The complaints on which the rate order was made were insufficient to give jurisdiction to or authorize said commission to make such order or to prescribe and establish maximum rates even if the act empowered the commission to establish and prescribe maximum rates on complaints of any character or under any circumstances.

The commission acted beyond its power in attempting to prohibit the railroad company from increasing or advancing any rate or rates it had or has in force and effect on any commodity or commodities belonging to either of the classes set out in the commodity clause in "Standard Tariff No. 1," notwithstanding the fact that such rates had not been found by said commission to be extortionate.

The said order shows on its face that the maximum rates

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therein prescribed were made applicable to some roads and not for the same distances and on the same classes of freight to all the other railroad companies operating lines in Kentucky, thereby depriving this appellee of equal protection of the laws. *Louisville & Nashville R. R. Co.* v. *McChord*, 103 Fed. Rep. 216; *Dow* v. *Beidelman*, 125 U. S. 680; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Interstate Commerce Comm.* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108; *L. & N. R. R. Co.* v. *R. R. Comm. of Tennessee*, 19 Fed. Rep. 679; *Terre Haute & Indianapolis R. R. Co.* v. *State*, 159 Indiana, 438.

*Mr. Edmund F. Trabue*, with whom *Mr. John C. Doolan*, *Mr. Attilla Cox, Junior*, and *Mr. J. M. Dickinson* were on the brief, for Illinois Central Railroad Company.

*Mr. John Galvin*, with whom *Mr. Edward Colston* and *Mr. Maurice L. Galvin* were on the brief, for the Cincinnati, New Orleans and Texas Pacific Railway Company.

*Mr. Alexander Pope Humphrey*, filed a brief in behalf of the Southern Railway Company in Kentucky.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The appellants deny the jurisdiction of the Circuit Court in this case. There is no diverse citizenship in the case of this particular company, and the jurisdiction must depend upon the presence of a Federal question. The bill filed by the company herein attacked the validity of the act of the legislature of Kentucky of March 10, 1900 (above set forth in full), on several grounds, as in violation of § 1 of the Fourteenth Amendment. It was also averred that the act was a violation of § 4, Art. IV, of the Federal Constitution, in that it constituted an abandonment by the State of Kentucky of a repub-

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lican form of government, in so far as it vested legislative, executive and judicial powers of an absolute and arbitrary nature over railroad carriers in one body or tribunal, styled the railroad commission. The company also contended that the act was in violation of the Federal Constitution, on account of the enormous fines and penalties provided in the act as a punishment for a violation of any of its provisions; also that the enforcement of the act would operate to deprive the company of its property without due process of law, and would deny to it the equal protection of the laws, in violation of § 1 of Art. XIV, of the Amendments to the Constitution of the United States. Other grounds of alleged invalidity of the act in question, as in violation of the Federal Constitution, are set up in the bill. The bill also contained the averment that the order of the railroad commission of Kentucky, in making a general schedule of maximum rates for the railroads mentioned in its order, was invalid, as unauthorized by the statute. This is, of course, a local or state question.

The Federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. *Horner* v. *United States* (*No. 2*), 143 U. S. 570, 576; *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 154; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *Burton* v. *United States*, 196 U. S. 283, 295; *Williamson* v. *United States*, 207 U. S. 425; *People's Savings Bank* v. *Layman*, 134 Fed. Rep. 635; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223. Of course, the Federal question must not be merely colorable or

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fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 695; *Michigan Railroad Tax Cases*, 138 Fed. Rep. 223, *supra*.

The character of some of the Federal questions raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court.

The appellants, however, contend that the jurisdiction of the Circuit Court did not attach under the Fourteenth Amendment, because of the allegations contained in the bill of the company, in which was contained an averment that the defendants below (the appellants here) had not been vested with the power, by either the constitution of the State of Kentucky or by any act of its legislature, or by any law, to make and enter the order of July 20, 1906, complained of in the company's bill. The argument of the appellants is that in order to violate the Fourteenth Amendment the action complained of must be under the authority of the State, and where the allegation of the bill was that "no power or authority had been vested in or conferred upon the appellants by the act of March 10, 1900, or by any law, to make or fix the rates complained of," such allegations swept away the foundation for the claim of Federal jurisdiction, inasmuch as in such case the action of the railroad commission was not the action of the State, and the principle decided in *Barney* v. *City of New York*, 193 U. S. 430, 437, was applicable.

If the averment as to the invalidity of the order of the commission were the only ground upon which a Federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the State, either by statute or in any other way, the objection might be good, but the bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself, on the ground that it violates various named provisions of the Federal Constitution in addition to and other than the Fourteenth Amendment, while some of the other Federal questions are founded upon the

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terms of the order made by the commission, under what is claimed by the commission to be the authority of the statute. The bill also sets up several local questions arising from the terms of the order, and which the company claims are unauthorized by the statute. The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the Circuit Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the Fourteenth Amendment.

Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

The commission has assumed the power under this statute of making what are termed general maximum rates for the transportation of all commodities upon all railroads to and from all points within the State, and this company is included in the general order made by the commission. This is an enormous power. Jurisdiction so extensive and comprehensive as must exist in a commission in the making of rates by one general tariff upon all classes of commodities upon all the railroads throughout the State is not to be implied. The proper establishment of reasonable rates upon all commodities carried by railroads, and relating to each and all of them within the State depends upon so many facts which may be very different in regard to each road, that it is plain the work ought not to be attempted without a profound and painstaking investigation, which could not be intelligently or with discrimination accomplished by wholesale. It may be matter of surprise to find such power granted to any commission, although it would seem



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that it has in some cases been attempted. *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479, 495. In any event, the jurisdiction of the commission to establish all rates at one time and in regard to all commodities on all railroads in the State, on a general and comprehensive complaint to the commission that all rates are too high, or upon like information of the commission itself, must be conferred in plain language. The commission, as an extraordinary tribunal of the State, must have the power herein exercised conferred by a statute in language free from doubt. The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction.

In this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject. Nevertheless, we are compelled to the belief that the statute does not grant to the commission any such great and extensive power as it has assumed to exercise in making the order in question.

The first section of the statute provides for a complaint being made to the commission accusing the railroad company of charging or receiving extortionate freight or passenger rates over its lines of railroad in that State; or if the commission receive information or have reason to believe that such rate or rates are being charged, it is its duty in either case to hear and determine the matter as speedily as possible. The commission is to give the company complained of not less than ten days' notice, and the notice must contain a statement of the nature of the complaint or matter to be investigated, and if the commission, after investigation of the complaint or on its own information, determines that the company has been guilty of extortion the commission is in that case authorized to make and fix "a just and reasonable rate, toll or compensation which said railroad company or corporation shall charge, collect or receive for like service thereafter rendered." The whole section, it seems to us, proceeds upon the assumption that complaint

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shall be made of some particular rate or rates being charged, or, if without formal complaint, the commission receives information or has reason to believe that such rate or rates are being charged, then the investigation is to go on in relation to those particular rates. We cannot for one moment believe that under such language as is contained in the section the commission is clothed with jurisdiction, either upon complaint or upon its own information, to enter upon a general investigation of every rate upon every class of commodities carried by all the roads of the State from or to all points therein, and make a general tariff of rates throughout the State, such as has been made in this case. No such power was given to the Interstate Commerce Commission. *Interstate Commerce Commission* v. *Cincinnati &c. Railway Co.*, 167 U. S. 479, *supra*. As the express power was not given in so many words to the commission, this court held that it could not be implied.

The so-called complaints in this case, above mentioned, are, as we construe the statute, entirely too general to raise any objection to a specific rate. Guenther, in his petition, in substance, alleged "that all local freight rates to and from all local points in the State of Kentucky, as fixed and charged by all railroads on all classes of freight, are excessive, discriminatory and extortionate." The lumber companies, which were permitted to intervene, made, substantially, the same complaint (with an addition as to lumber, ties and logs), and the attorneys appearing in behalf of the State of Kentucky joined in the general complaint of Guenther. If complaint were necessary to enable the commission to make rates, the allegations in the complaint of Guenther were mere sweeping generalities, and were in no sense whatever a fair or honest compliance with the statute. The commission itself, in order to act, must have had some information or had some reasons to believe that certain rates were extortionate, and it could not, under this statute, enter upon a general attack upon all the rates of all the companies throughout the State and make an order such as this in question. Such action is, in our judgment, founded upon a total

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misconstruction of the statute and an assumption on the part of the commission of a right and power to do that which the statute itself gives it no authority whatever to do.

And again, the section provides that if the commission should determine that the company had been guilty of extortion, it must, instead of the extortionate rate, make and fix a reasonable and just rate which the company may charge for its service thereafter rendered. This language is not apt by which to confer power to establish a schedule of rates applicable in all cases to all commodities and on all roads, and on the contrary it strengthens the view that no such general jurisdiction to establish rates in all cases for all roads throughout the State by a general tariff was in the contemplation of the framers of the statute.

It may also be stated that if the statute was really intended to give the commission power to make a general schedule of rates, we should expect to find, almost necessarily, a right to increase as well as to reduce those rates in some instances, in order to produce an equality, where, otherwise, great inequalities might exist as a result of the putting the general schedule of reductions in force. Here is a case where the schedule of rates was reduced from twenty to twenty-five per cent upon an average. Some of the rates not touched might require increase in order to make the whole schedule fair and reasonable, and yet the commission could not make the increase over the amount theretofore collected by the company. This seems to us to be a very strong argument in favor of the view that the legislature never intended to and did not in fact give such a power to establish general maximum rates, but confined it to one or two or a few specified rates, which might be reduced upon complaint, and where there might be a real investigation of all the problems involved in the propriety of the reduction in a few distinct and separate cases. A sufficient investigation of the whole series of rates on all the roads in the State by one commission is almost an impossibility, and an attempt to do so would prove a failure, and would, in all probability, result in gross injustice

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to the roads. The statute, it will be remembered, gives no power to the commission to fix rates, unless it has already determined that the rates complained of, or which it has investigated upon its own information, are extortionate after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate there can be no fixing of rates in that particular. And yet that particular rate might require increase in order to make the whole schedule just, fair and reasonable. A general power to fix rates under such limitations cannot be supposed to have been within the intent of the legislature. The difference between the fixing of one rate, or a few upon specific complaint or information, and the adoption of a general scheme of rates applicable in all cases to all the roads, is vast and important. In the one case it can be fairly accomplished, while in the other the chances of injustice and great inequalities are infinite and almost certain to occur.

We do not say that under this statute, as we construe it, there must be a separate proceeding or complaint for each separate rate. A complaint, or a proceeding on information by the commission itself, in regard to any road, may include more than the rate on one commodity or more than one rate, but there must be some specific complaint or information in regard to each rate to be investigated, and there can be, under this statute, no such wholesale complaint, which by its looseness and its generalities can be made applicable to every rate in operation on a railroad, or upon several or all of the railroads of the State. If the legislature intended to give such an universal and all-prevailing power it is not too much to say that the language used in giving it should be so plain as not to permit of doubt as to the legislative intent.

The appellants contend that in any event the order made by the commission December 7, 1905, regarding rates on lumber, logs and cross ties, to and from all points in the State, ought to stand as reasonable and proper. The complaint made by the lumber dealers in their petition to intervene in the Guenther

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proceeding adopted the language of that petition as to all rates upon all commodities upon all roads throughout the State, and then added a specific complaint as to the logs, &c. While the whole proceeding as to all rates was pending before the commission it took up as part of it, the question of the reasonableness of all the rates on lumber to and from all points in the State. This proceeding is, therefore, but a part of the whole proceeding involving an investigation as to every rate on all commodities on every road throughout the State, and we do not think it a case where a particular rate on a specific commodity, applicable all through the State upon all roads, should be separated from the general order, when the specific order was made after the general complaint was filed and is itself a general order, and was made by the commission in the exercise of an assumed power claimed to be given by the statute, which claim we hold was totally unfounded. We therefore think that in this particular case the order as to lumber rates must fall with the rest of the assumed jurisdiction of the commission.

There is nothing in our decision in *McChord* v. *L. & N. R. R.*, 183 U. S. 483, which affects the question discussed in this opinion.

We are of opinion that under the statute the commission had no authority to make a general tariff of rates, and the final decree of the Circuit Court is for that reason

*Affirmed.*

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# SILER *et al.*, AS RAILROAD COMMISSION, *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

# SAME *v.* SOUTHERN RAILWAY COMPANY IN KENTUCKY.

# SAME *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Nos. 522, 523, 524. Argued February 24, 25, 26, 1909.—Decided April 5, 1909.

Decided on authority of *Siler* v. *Louisville & Nashville Railroad, ante,* p. 175.

THESE cases involved the same questions as were involved in the preceding case and were argued simultaneously therewith.[1]

*Mr. C. C. McChord* and *Mr. Robert H. Winn,* with whom *Mr. James Breathitt,* Attorney General of Kentucky, was on the brief, for the appellants.

*Mr. Henry L. Stone* for appellee in No. 521.

*Mr. E. F. Trabue,* with whom *Mr. John C. Doolan* and *Mr. Jacob M. Dickinson* were on the brief, for appellee in No. 522.

*Mr. Alexander Pope Humphrey* submitted a brief for appellee in No. 523.

*Mr. John Galvin,* with whom *Mr. Edward Colston* was on the brief, for appellee in No. 524.

[1] For abstracts of arguments see, *ante,* p. 183.

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MR. JUSTICE PECKHAM. The above-entitled cases raise the same question that is decided in Louisville and Nashville Railroad Company, *supra*, and, upon its authority, the decrees in the above cases are

*Affirmed.*

## SELLIGER *v.* COMMONWEALTH OF KENTUCKY, BY ALEXANDER, REVENUE AGENT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 115. Argued March 16, 17, 1909.—Decided April 5, 1909.

Where there is nothing in the record on which to base them this court cannot indulge in presumptions as to which of several possible forms a transaction may have taken.

Where goods are exempt from the taxing power of the State under the Constitution of the United States because not within the State, the protection of the Constitution extends to warehouse receipts for those goods locally present within the State; and this rule applied to whiskey in a foreign country, warehouse receipts for which were held by a person in Kentucky and sought to be taxed as personal property at owner's domicil.

A tax upon warehouse receipts for goods amounts in substance and effect to a tax upon the goods themselves. *Fairbank* v. *United States*, 181 U. S. 283.

The facts are stated in the opinion.

*Mr. Alexander Pope Humphrey* and *Mr. John L. Dodd*, with whom *Mr. Joseph C. Dodd* was on the brief, for plaintiff in error:

The tax in question violates § 10, Art. I, of the Constitution of the United States prohibiting a State from laying any tax upon exports. *Brown* v. *Maryland*, 12 Wheat. 419; *The License Cases*, 5 How. 575; *Almy* v. *California*, 24 How. 169; *Low* v. *Austin*, 13 Wall. 29; *May* v. *New Orleans*, 178 U. S. 504, distinguished.

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The tax here attempted to be levied is in violation of the Fourteenth Amendment to the Constitution of the United States. Personal property having an actual situs beyond the territorial boundary of a State cannot be taxed by that State. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409.

A warehouse receipt is nothing more or less than a document of title, and has always been so treated. One of its uses is as a means by which delivery can be made of an article of personal property which has been sold. 2 Benj. on Sales, 1043; 10 A. & E. Ency. of Law, 1; *Gibson* v. *Stevens*, 8 How. 399, 400; *Leonard* v. *Davis*, 1 Black, 482, 483; *Holliday* v. *Hamilton*, 11 Wall. 564, 565; *The Thames*, 14 Wall. 106; *Crapo* v. *Kelly*, 16 Wall. 640; *Insurance Co.* v. *Kiger*, 103 U. S. 556; *Union Trust Co.* v. *Wilson*, 198 U. S. 538, 539.

The German warehouse receipts are merely evidence that a given amount of whiskey has been stored there. It is the whiskey, which the receipts are given as evidence of, that has actual value, and the receipts cannot be taxed because to do so would be in effect to tax the whiskey, which, confessedly, is beyond the reach of the taxing power of Kentucky. See *Almy* v. *California*, 24 How. 169; *Tremlett* v. *Adams*, 13 How. 303; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 581; *Postal Tel. Co.* v. *Adams*, 155 U. S. 698; *Dobbins* v. *Commissioners*, 16 Pet. 435; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Mobile*, 127 U. S. 640.

*Mr. M. J. Holt*, with whom *Mr. B. F. Washer* was on the brief, for defendant in error:

If the 7,000 barrels of whiskey were exported temporarily, that is, to await a better market and to be re-imported when the price justified, or to evade for the time being the revenue tax of ninety cents per gallon, the taxable situs is in Kentucky, the

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place of residence of the owner. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *Board &c.* v. *Fidelity Trust Co.*, 111 Kentucky, 667; *May* v. *New Orleans*, 178 U. S. 507; Kentucky Const., §§ 172, 174; Kentucky Stat., § 4020.

If the whiskey, by reason of its exportation and actual situs in Germany, is exempt from a state ad valorem tax, then the warehouse receipts are taxable.

Whiskey warehouse receipts are intangible property, the situs of which is at the domicil of the owner. They are property in and of themselves, and are not mere indicia of title.

By the common and civil law, by the law merchant, and by express statutory provision (Ky. Stats., § 4770) they are negotiable instruments. *Commonwealth* v. *Selliger*, 30 Ky. L. Rep. 452, 453; *Farmer* v. *Ethridge*, 24 Ky. L. Rep. 653; *Cochran &c.* v. *Ripy*, 13 Bush (Ky.), 505; *Greenbaum* v. *Meggilen*, 10 Bush (Ky.), 420; Purdy's Beach on Priv. Corp., §§ 271, 272, 509*a*, 350, 510; *Board &c.* v. *Fidelity Trust Co.*, 111 Kentucky, 677; 30 A. & E. Ency. Law, pp. 69–77; *Winslow* v. *Fletcher*, 52 Am. Rep. 122; *Wilkesbarre &c.* v. *Wilkesbarre*, 148 Pa. St. 601; *Whitaker* v. *Brooks*, 90 Kentucky, 76; *Knox* v. *Eden*, 148 N. Y. 441; *Columbus &c.* v. *Wright*, 151 U. S. 470.

The provision of the Federal Constitution, Art. I, § 10, Subs. 2, "that no State shall lay an impost or duties on imports or exports," does not apply to the levy of an ad valorem tax on this whiskey or the warehouse receipts as the property of plaintiff in error, because: It is a tax levied upon the property of all citizens of this State, wherever situated. It is not an impost or duty.

The whiskey has lost the character of an export, the original shipment has been broken, four-fifths of it have been sold, the consignor and consignee are one and the same, and the residue is on the market and for sale. *May* v. *New Orleans*, 178 U. S. 501, 509 (import case); *Coe* v. *Errol*, 116 U. S. 517 (export case); *Turpin* v. *Burgess*, 117 U. S. 506, 507 (export case); *American Steel Co.* v. *Speed*, 114 U. S. 510, 519.

No Federal question is involved. *McCullough* v. *Maryland*,

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4 Wheat. 316, 418, 428, 429; *Burke* v. *Wells*, 208 U. S. 22–25; *Union Pac. Ry. Co.* v. *Peniston*, 18 Wall. 5; *Lewis* v. *Monson*, 151 U. S. 549; *Home Ins. Co.* v. *New York*, 134 U. S. 600; *Delaware R. R. Tax Case*, 18 Wall. 206, 231; *Coe* v. *Errol*, 116 U. S. 524; *Saving Society* v. *Multnomah County*, 169 U. S. 426, 427, 431; *Kirtland* v. *Hotchkiss*, 105 U. S. 498; *Bank U. S.* v. *Huth*, 4 B. Mon. (Ky.) 443; *New Orleans* v. *Stempel*, 105 U. S. 320.

Mr. Justice Holmes delivered the opinion of the court.

This is a proceeding to recover back-taxes on personal property of the plaintiff in error, hereafter called the defendant. He pleaded that he did own certain barrels of whiskey which he did not list for the years in question, but that he had exported them to Bremen and Hamburg, in Germany, for sale abroad, and that the State was forbidden to tax them, both because they were exports, U. S. Const., Art. I, § 10, and because their permanent situs was outside the State. Fourteenth Amendment. *Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194. The plaintiff replied, denying that the export was for sale and that the situs of the whiskey was abroad. It alleged that the defendant was a citizen and resident of Kentucky, engaged there in the wholesale whiskey business, and that he shipped the whiskey to Germany merely to evade revenue and ad valorem taxes on the same. It alleged further that the defendant remained the owner and in possession of the whiskey, except such portion as he reshipped to himself or to purchasers in the United States, that while the whiskey remained in the German warehouses he held the warehouse receipts, used them as collaterals and traded in them, and that the barrels of whiskey sold by him were mostly returned to the State of Kentucky, and all to the United States. The court of first instance held that the whiskey was exempt on both the grounds taken by the defendant. On appeal to the state circuit court for the county, the judgment was affirmed

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on the ground that the situs of the whiskey was outside the State. A further appeal was taken to the Court of Appeals, and that court, accepting the fact that the whiskey was beyond the taxing power of Kentucky, nevertheless sustained the tax as a tax on the warehouse receipts. The case then was brought by writ of error to this court.

We think that we have stated the effect of the pleadings fairly, and it will be observed that the plaintiff's claim was of a right to tax the whiskey, the warehouse receipts being mentioned only to corroborate the plaintiff's contention as to the true domicil of the goods. After the decision, the amount of whiskey for which the defendant held German warehouse receipts at the material times and the value of the whiskey were agreed, and thereupon the court, reciting the agreement, directed a judgment for taxes due upon the warehouse receipts, valuing them at the agreed value "per barrel of whiskey embraced in them." So that it will be seen that the effect is the same as if the whiskey itself had been taxed, and the question is whether, by such a dislocation of the documents from the things they represent, a second property of equal value is created for taxing purposes, which can be reached although the first could not. Possibilities similar in economic principle sometimes have to be, or at least have been, recognized, but of course, economically speaking, they are absurd.

We are dealing with German receipts, and therefore we are not called upon to consider the effect of statutes purporting to make such instruments negotiable. Bonds can be taxed where they are permanently kept, because by a notion going back to very early law the obligation is, or originally was, inseparable from the paper or parchment which expressed it. *Buck* v. *Beach*, 206 U. S. 392, 403, 413. That case and the authorities cited by it, show how far a similar notion has been applied to negotiable bills and notes. But a warehouse receipt does not depend upon any peculiar doctrine for its effect. A simple receipt merely imports that goods are in the hands of a certain kind of bailee. But if a bailee assents to becoming

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bailee for another to whom the owner has sold or pledged the goods, the change satisfies the requirement of a change of possession so far as to validate the sale or pledge. Therefore it is common for certain classes of bailees to give receipts to the order of the bailor, and so to assent in advance to becoming bailee for any one who is brought within the terms of the receipt by an endorsement of the same. But this does not give the instrument the character of a symbol, it simply makes it the means of bringing about what is somewhat inaccurately termed a change of possession, upon ordinary legal principles, just as if the goods had been transported to another warehouse. *Union Trust Co.* v. *Wilson*, 198 U. S. 530, 536. If the receipt contains no clause of assent to a transfer, it has been held that an endorsement goes no further than a transfer and unaccepted order on any other piece of paper. *Hallgarten* v. *Oldham*, 135 Massachusetts 1.

The form of the receipts given in Germany does not appear. It does not appear that they contained any assent to transfer, unless by conjecture from the defendant's testimony that he pledged them for loans. Even that conjecture is made more doubtful, if not excluded, by the findings of the lower courts. It does not appear that the Court of Appeals made a different finding if it had the power to do so. This court can make none. There is no presumption that we know of that the transactions took one form or had one effect rather than another.

We can think of but two ways in which the receipts could amount to more than a mere convenience for getting quasi-possession of the goods. In the first place, they might express or imply a promise to be answerable, or carry a statutory liability, for a corresponding amount in case the property referred to was delivered to another without a surrender of the receipts. See *Mechanics' & Traders' Ins. Co.* v. *Kiger*, 103 U. S. 352. Such a promise might have a distinct value if the promisor had credit. But it cannot be assumed on this record that the receipts contained it, and if they did, even then the value of the instrument would be due rather to the assumption that the

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bailee would not give up the goods without a return of it than to the promise. The value of the promise would vary with the promisor. As a key to the goods a receipt no more can be called a second property of equal value than could a key to an adamantine safe that could not be opened without it be called a second property of a value distinct from but equal to that of the money that the safe contained. The receipt, like the key, would be property of some small value distinct from that to which it gave access. But it would not be a counterpart, doubling the riches of the owner of the goods.

In the second place, the receipt might be made the representative of the goods in a practical sense. A statute might ordain that a sale and delivery of the goods to a purchaser without notice should be invalid as against a subsequent *bona fide* purchaser of the receipt. We need not speculate as to how the law would deal with it in that event, as we have no warrant for assuming that the German law gives it such effect. On the facts before us, and on any facts that the Court of Appeals can have had before it, the receipts cannot be taken to have been more than one of several keys to the goods. It cannot be assumed that a good title to the whiskey could not have been given while the receipts were outstanding. We assume that they made it very unlikely that it would be, but the practical probability does not make the instrument the legal equivalent of the goods. We take it to be almost undisputed that if the warehouses were in Kentucky the State would not and could not tax both the whiskey and the receipts, even when issued in Kentucky form, and that it would recognize that the only taxable object was the whiskey. The relation of the paper to the goods is not changed by their being abroad, and the only question in the case is whether the paper can be treated as property equivalent in value to the goods, because in some way it represents them.

We state the question as we have stated it because that is the one that is raised by the decision under review. It would be a mere quibble to say that the receipts, as paper, had an in-

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finitesimal value, that they acquired a substantial one, although much less than that of the whiskey, because of their practical use, and that this court is not concerned with a mere overvaluation. The tax is imposed on the theory that the receipts are the equivalents of the goods and are taxable on that footing, although the goods cannot be taxed. Assuming, as the Court of Appeals assumed, that the whiskey is exempt under the Constitution of the United States, we are of opinion that the protection of the Constitution extends to warehouse receipts locally present within the State. What was said by Chief Justice Taney about bills of lading applies to them, *mutatis mutandis:* "A duty upon that is, in substance and effect, a duty on the article exported." *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283, 294. We discuss the case on the facts assumed by the Court of Appeals. Whether a finding would have been warranted that the whiskey still was domiciled in Kentucky, or for any other reason was not exempt, is a matter upon which we do not pass. See *New York Central & Hudson River R. R. Co.* v. *Miller*, 202 U. S. 584, 597.

*Judgment reversed.*

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## CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* MCCABE, ADMINISTRATRIX.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 89. Argued January 25, 1909.—Decided April 5, 1909.

Where the case goes more than once to the highest court of the State only the last judgment is the final one.

Where the highest court of the State reverses an order of an inferior state court removing a cause and remands the case to the state court for trial, and, after trial and verdict for plaintiff, the judgment is sustained by the highest court, the last judgment is the only final one to which the writ of error will run from this court; defendant cannot

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prosecute a writ of error to the judgment remanding the cause. *Schlosser* v. *Hemphill*, 198 U. S. 173.

The United States Circuit Court has jurisdiction to determine for itself the removability of a cause and may take jurisdiction thereof and protect such jurisdiction even though the state court refuse to make the removal order; and a final judgment, rendered by and under such conditions by the Circuit Court, cannot be reviewed by the state court, but such judgment is binding on the state court until reversed by this court.

While a petitioner, if the state court denies his petition for removal, may remain in that court and bring the case here for review on writ of error after final judgment, he is not obliged so to do, but may file the record in the Circuit Court, and that court has jurisdiction to determine the question of removability and, notwithstanding § 720, Rev. Stat., it may protect its jurisdiction by injunction against further proceedings in the state court. *Traction Co.* v. *Mining Co.*, 196 U. S. 239.

A judgment rendered by the Circuit Court under such conditions is not void even if jurisdiction be improperly assumed and retained, as the jurisdictional question can be reviewed by this court, and, until reversed, the judgment is binding on the state court and cannot be treated as a nullity. *Dowell* v. *Appelgate*, 152 U. S. 327.

THIS action was brought September 27, 1901, by the defendant in error in the Mason County Circuit Court of Kentucky against the Chesapeake and Ohio Railway Company, a Virginia corporation, and the Maysville and Big Sandy Railroad Company of Kentucky, to recover damages for the death of her intestate, by the negligence, as it is alleged, of the Chesapeake and Ohio Railway Company, in operating one of its trains over a railroad track, which had been leased to it by the other company.

The allegations of the petition in substance are that the intestate of defendant in error received injuries which caused his death by being negligently run into by a train operated by the Chesapeake and Ohio Railway Company. And negligence is charged against the Maysville and Big Sandy Railroad Company, in permitting its tracks to be used by the other company. It alleges that more than twelve months before the injuries to her intestate the Maysville and Big Sandy Railroad Company

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leased and transferred its entire line to the Chesapeake and Ohio Railway Company, and that the latter has had since that time the exclusive possession and control of it; that by the laws of Kentucky the lease and transfer were *ultra vires* and void; that in December, 1893, under § 211 of the constitution of Kentucky, and under § 841 of the statute of the State, the Chesapeake and Ohio Railway Company became a corporation, citizen and resident of the State, by filing in the office of the Secretary of State, and in the office of the Railroad Commissioner, copies of its articles of incorporation, and that thereupon a certificate of incorporation was issued to it by the Secretary of State. The petition further alleges that the railroad track was laid in Third street in Maysville under an ordinance from the city authorities; that the railroad occupied the whole street, so as to render it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize such use of the street, and that the ordinance was void, and the operation of the trains on the street was illegal.

On December 11, 1901, the Chesapeake and Ohio Railway Company filed a petition to remove the action to the Circuit Court of the United States for the Eastern District of Kentucky. The petition set up that the Chesapeake and Ohio Railway Company was a Virginia corporation; that the suit was of a civil nature; that the amount involved exceeded $2,000; that in the suit there was a controversy which was wholly between citizens of different States, to wit, between the Chesapeake and Ohio Railway Company, a citizen of Virginia, and the plaintiff in the suit, who was a citizen of the State of Kentucky. It was further alleged that the Maysville and Big Sandy Railroad Company was not a necessary party to the suit, but was made a defendant therein "for the sole and simple purpose" of preventing the Chesapeake and Ohio Railway Company from removing the suit to the Circuit Court of the United States, and thereby unlawfully, wrongfully and fraudulently depriving it of a right conferred by the Constitution and laws of the United States.



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Petitioner quotes all the allegations of the plaintiff connecting the Maysville and Big Sandy Company with liability, and avers that "each and all of them" were "untrue and palpably so, and were known to the plaintiff to be untrue" when made in the original and amended petition. Petitioner alleges that by reason of its charter and amendments thereto, and partly of the act of February 17, 1866, entitled "An act authorizing the sale of the Maysville and Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road," (Session Acts, 1866, page 644), and of the General Laws of the State of Kentucky, the Maysville and Big Sandy Railroad Company, which petitioner states was reorganized under said act and laws, before the making of said contract and lease, had full authority to make the same, and that petitioner was operating the railway under the same at the time of the injury complained of. And the petitioner finally "charges and avers that the allegations of the plaintiff's petition and amended petition, hereinbefore recited and controverted, were made and its co-defendant was made defendant to this action, and was sued for the injury complained of herein, for the sole and fraudulent purpose of depriving this defendant of the right to remove this action to the Federal court for the Eastern District of Kentucky, and of depriving that court of its jurisdiction."

The petition was granted and the clerk of the court on the fourteenth of December, 1901, was directed to make up the record of said cause for transmission to the Circuit Court of the United States for the Eastern District of Kentucky. The plaintiff in the case excepted to the order and subsequently made a motion to set it aside, which was denied. An appeal from the order to the Court of Appeals was immediately granted, which court, on the fifth of March, 1902, reversed the order and remanded the case for trial. 112 Kentucky, 186. The trial was had and the jury instructed by the court to find in favor of the defendant. This judgment was reversed by the Court of Appeals. 28 Ky. Law Rep. 536. Another trial was had, result-

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ing in a verdict and judgment for plaintiff in the sum of $2,500. The judgment was sustained by the Court of Appeals. 30 Ky. Law Rep. 1009. To this judgment the writ of error in the present case was taken.

The record further shows that after the appeal from the order of removal plaintiff in error filed a transcript of the record in the Circuit Court of the United States for the Eastern District of Kentucky, and the case was duly docketed. After the decision of the Court of Appeals of Kentucky, reversing the order of the Mason County Circuit Court, removing the case to the Circuit Court of the United States, plaintiff filed in the latter court a motion to remand the case to the state court. On October 19, 1903, that motion was overruled.

On April 4, 1904, the Chesapeake and Ohio Railway Company filed in the Circuit Court of the United States its answer to the petition of the plaintiff, and on motion of the latter the cause was set down for trial April 12. On the latter date the Chesapeake and Ohio Railway Company moved for judgment of dismissal of the suit on the face of the pleadings. This motion was granted, and also a demurrer of the Maysville and Big Sandy Railroad Company was sustained to the petitions and judgment rendered.

On November 17, 1903, plaintiff in error offered for filing an answer in the Mason County Circuit Court, which set up the petition for removal, and the order thereon removing the cause to the Circuit Court of the United States, the filing in the latter court of the transcript of the record and the docketing of the cause the thirteenth of January, 1902. The answer alleged also that on motion of the defendants a rule was issued against the plaintiff to show cause why she should not be required to give bond for costs or make a deposit of money in lieu thereof, that the plaintiff filed a response thereto, and after the decision of the Court of Appeals of Kentucky, reversing the order removing the cause to the Circuit Court of the United States appeared by her counsel in the latter court, filed a petition to remand the case to the state court, a brief in support thereof, the opinion

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of the Court of Appeals, and that on the nineteenth of October, 1903, the motion was denied.

The motion to file the answer was denied by the state court, but by order of the court it was made part of the record.

Notwithstanding the judgment of April 12, 1904, of the Circuit Court of the United States dismissing the action, the case remained on the docket of the state court, and before it was called for trial again the defendants therein (plaintiffs in error here) tendered an amended answer, setting out all the proceedings in the Circuit Court of the United States, attaching thereto copies of the judgments of that court, and alleging that they were in "force and effect unreversed," and pleaded "the same to plaintiff's recovery against them and each of them in said action." The court refused to let the answer be filed but ordered that it be made part of the record.

*Mr. E. L. Worthington*, with whom *Mr. W. H. Wadsworth* and *Mr. W. D. Cochran* were on the brief, for plaintiff in error:

The judgment of the United States court in this action was not void, even if the Federal court erred in taking jurisdiction, and if not void, then however erroneous it may have been, it was, until reversed, a bar to further proceedings, on the same cause of action, in the state court. *Dowell* v. *Applegate*, 152 U. S. 327; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Kern* v. *Huidekoper*, 103 U. S. 485; *Northern Pacific R. R. Co.* v. *McMullen*, 86 Wisconsin, 501.

A petition for removal and bond constitute the process by which a case is transferred from a state to a Federal court. *Kinney* v. *Columbia Savings & Loan Asso.*, 191 U. S. 78; *Ex parte Wisner*, 203 U. S. 449. A motion to remand is an objection to the sufficiency of the process. When a party comes into a Federal court and objects to the sufficiency of the process by which it was sought to bring him before the court, it is, in substance, a motion to quash the process. When a motion to quash a process is made and overruled, the question of the sufficiency of the process is *res judicata* between the parties.

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*Mr. Allan D. Cole*, with whom *Mr. W. T. Cole* was on the brief, for defendant in error:

The judgment of the United States Circuit Court for the Eastern District of Kentucky, pleaded in bar herein, is a nullity. *Dexter, Horton & Co.* v. *Sayward*, 84 Fed. Rep. 299; *Amory* v. *Amory*, 95 U. S. 186; *Insurance Co.* v. *Pechner*, 95 U. S. 183; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Metcalf* v. *Watertown*, 128 U. S. 586; *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *Graves* v. *Corbin*, 132 U. S. 571.

Where it appears affirmatively by its own record that a court did not have jurisdiction of the cause, its judgment is not merely voidable but is an absolute nullity. *Dexter, Horton & Co.* v. *Sayward*, 84 Fed. Rep. 299; citing: *Galpin* v. *Page*, 18 Wall. 350; *Windsor* v. *McVeigh*, 93 U. S. 277; *Pennoyer* v. *Neff*, 95 U. S. 714; *Settlemeir* v. *Sullivan*, 97 U. S. 444; *In re Ayers*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Hovey* v. *Elliott*, 167 U. S. 409.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it acts without authority, its judgment and orders are not voidable, but simply void. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers. *Elliott* v. *Piersol*, 1 Pet. 328, 342. See also *Hickey* v. *Stewart*, 3 How. 750, 763; *Williamson* v. *Berry*, 8 How. 495–565; *Thompson* v. *Whitman*, 18 Wall. 457, 471; *In re Sawyer*, 124 U. S. 200, 225; *Guarantee Trust & Safe Deposit Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137–151.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

From the foregoing statement it is apparent that the princi-

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pal question in this case, and it is the one which we regard as decisive of it, concerns the effect of the judgment rendered in the Circuit Court of the United States after it had taken jurisdiction, which was undertaken to be set up in the state court as a bar to further proceedings therein. It is contended by the defendant in error that when the Court of Appeals of Kentucky rendered its judgment holding that the case was not a removable one (March 5, 1902), that was a final judgment upon the question of jurisdiction, and the case should have been brought here for review and determination. But we are of opinion that this contention is not tenable. The case was three times in the Court of Appeals of Kentucky, and only the last judgment in that court was a final one. As we have seen, the state Circuit Court, in which the action was originally begun, held the case was a removable one, and from that order an appeal was prosecuted to the Court of Appeals of Kentucky, that court, concluding that both railroads could be properly joined in the action, held that the case was not removable, and remanded the same to the state court for further proceedings.

Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined in the judgment now under review to again consider the question. The judgment under review was the only final judgment in the appellate court of the State from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser* v. *Hemphill*, 198 U. S. 173, and cases therein cited.

The Circuit Court of the United States having taken jurisdiction of the case upon the removal, and having refused to remand it, and proceeded to final judgment, should the state

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court, when that judgment was offered to be pleaded before it, have given effect to the judgment? That is the Federal question presented in this case. It is insisted for the defendant in error that the right of removal depends upon the presentation to the state court of a proper petition for removal, which petition should contain the essential allegations necessary to make out a case under the statute for that purpose, and that unless this is done the jurisdiction of the state court is not divested. And in aid of that contention cases are cited which hold that a plaintiff has the right to make a cause of action joint when acting in good faith, and when he has so made it, the action is deemed to be joint for the purpose of determining the right of removal. *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206; *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Bohon*, 200 U. S. 221. And inasmuch as the state court has held that the Maysville and Big Sandy Railroad Company, under the law of Kentucky, could be properly joined as defendant with the Chesapeake and Ohio Railway Company in this case, it is insisted that the plaintiff had a right to sue both companies, and that the averment in the petition for removal, that the joinder was fraudulent, goes for nothing in the absence of a showing of facts which make such joinder fraudulent in fact. *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176.

It is insisted that this contention is supported by a line of cases in this court, which have held that a state court is not bound to surrender its jurisdiction until a petition for removal has been filed which upon its face shows that the petitioner has a right to the transfer of the cause. And it is contended that the petition in this case, in view of the decision of the Court of Appeals of Kentucky as to the right to prosecute a joint cause of action, did not make a case for removal, and, therefore, the state court did not lose its jurisdiction. To maintain the general proposition that a petition making a case for removal upon its face is essential to confer jurisdiction upon the United States Circuit Court attention is called to a number of cases decided in this court: *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v.

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*Hyatt & another*, 118 U. S. 279; *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio & Mississippi Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *Graves* v. *Corbin*, 132 U. S. 571.

In these cases the jurisdiction of the state courts was maintained for the want of an adequate petition showing facts which required an order of removal. In none of them was involved the effect of the judgment of a United States Circuit Court taking jurisdiction upon removal, unreversed and in full force and effect. That the Circuit Court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject. In § 3 of the removal act (1 Comp. Stat. 510) it is provided that, a petition and bond being entered in the Circuit Court of the United States, the cause shall proceed in the same manner as if it had originally been commenced in the Circuit Court. And in § 5 of the act it is provided that the Circuit Court of the United States may at any time that it appears that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to the suit have been improperly and collusively joined for the purpose of creating a case removable under the act, remand and dismiss the same as justice may require. Section 7 of the act of 1875 (1 Comp. Stat. 512) provides that a Circuit Court, in any case removable under the act, shall have power to issue a writ of certiorari to the state court, commanding that court to make return of the record in any cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce such writ according to law.

It is apparent that these provisions are intended to confer jurisdiction upon the United States Circuit Court to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the state court to remove the case, the party desiring the removal may file a transcript of the record in the Circuit Court of the United States, and if the case was a removable one it is

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immaterial that the state court has denied the petition for removal. *Kern* v. *Huidekoper*, 103 U. S. 485, and cases therein cited. And it was held in *Traction Company* v. *Mining Co.*, 196 U. S. 239, that notwithstanding the refusal of the state court to make an order of removal, the controversy being removable to the United States Circuit Court, that court might protect its jurisdiction by injunction against further proceedings in the state court.

In view of these provisions of the statute and the decisions of this court construing the same we think it was the intention of Congress to confer upon the Circuit Court of the United States a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. And while it is true that when the judgment of a state court is under consideration it may properly be held that the courts of the State are not obliged to surrender their jurisdiction until a petition is filed making a proper ground for removal, it does not follow that, when the jurisdiction of the Circuit Court of the United States is invoked, its judgment holding a case removable and rendering a final judgment therein, can be disregarded by the state court where it is properly set up before judgment, as was done in the present case. If this be not so, the state court may ignore an unreversed judgment of the United States Circuit Court deciding a question of Federal jurisdiction within the power conferred upon it by Congress, and wherein it was intended to give to the state court no right to review such action, and wherein the judgment is binding until properly reversed in this court, in which the question of jurisdiction can alone be finally settled, whether brought here from a state or Federal court.

The Circuit Court of the United States having an independent jurisdiction to determine the removability of the cause, what is the proper procedure when, as has sometimes happened, the Federal court differs from the state court upon this question? This question was dealt with in *Railroad Company* v. *Koontz*, 104 U. S. 5, 15, wherein Mr. Chief Justice Waite, speaking for the court, said:

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"The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the state court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error the case is sent back to the state court with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in *Gordon* v. *Longest*, 16 Pet. 97. The petitioning party has the right to remain in the state court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the state court is going on. This was actually done in the Removal Cases. When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the state court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbit* v. *Clark*, 103 U. S. 606. If, in such a case, we reverse the order of the Circuit Court to remand, our instructions to that court are, as in *Relfe* v. *Rundle*, 103 U. S. 222, to proceed according to law, as with a pending suit within its jurisdiction by removal."

So far as the case now before us is concerned it is immaterial that under the act of March 3, 1887, the decision of a Circuit Court of the United States remanding a case to the state court is final. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556.

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Again, speaking for the court on the same subject, in *Burlington &c. Railway Co.* v. *Dunn*, 122 U. S. 513, 516, Mr. Chief Justice Waite said:

"But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount."

From these decisions it is apparent that, while the petitioner, in the event of an adverse decision, in the state court, may remain in that court, and after a final judgment therein bring the case here for review, he is not obliged to do so. He may file the record in the Circuit Court of the United States, as was said by Mr. Chief Justice Waite, while the case is going on in the state court. The Federal statute then gives to the United States Circuit Court jurisdiction to determine the question of removability, and it has the power, not given to the state court, to protect its jurisdiction, notwithstanding § 720 of the Revised Statutes, by an injunction against further proceedings in the state courts. *Traction Company* v. *Mining Company*, 196 U. S. 239.

In order to prevent unseemly conflict of jurisdiction it would seem that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the Circuit Court of the United States is reviewed in this court. If the Federal jurisdiction is not sustained the case will be remanded with instructions that it be sent back to the state court as if no removal had been had. *Railroad Company* v. *Koontz*, *supra*.

Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the Federal court in aid of its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States Cir-

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cuit Court, from which no writ of error is taken, and rendered in the Federal court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the Federal court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Navigation Company* v. *Iowa Homestead Company*, 123 U. S. 552, this court considered the effect of a judgment rendered in the Federal court upon removal from the state court. In that case it appeared that the Federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same State as the plaintiff. The state court of Iowa refused to give effect to the judgment of the Federal court, and its judgment was reversed. Mr. Chief Justice Waite, speaking for the court, said (123 U. S. 559):

"Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its

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decision was right, in this or any other respect, was to be finally determined by this court on appeal."

In *Dowell* v. *Applegate*, 152 U. S. 327, the benefit of a judgment in the Circuit Court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff in error, and it was contended that the conveyance was void, inasmuch as the Federal court had no jurisdiction of the suit in which the sale was ordered. It was held in this court that even if the Federal court erred in assuming or retaining jurisdiction of the suit, its decree being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (152 U. S. 340):

"These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Börs* v. *Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court."

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the state Circuit Court that court

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held the case removable, and the record was filed in the Federal court. Afterwards that court, upon the application of the plaintiff, refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the state court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the Federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the state court, denying his right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently upon the theory that the judgment of the Federal court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable.

*The judgment of the Court of Appeals of Kentucky is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.*

Dissenting: MR. JUSTICE MCKENNA.

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# CODER, TRUSTEE OF ARMSTRONG, BANKRUPT, v. ARTS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 93. Argued January 26, 1909.—Decided April 5, 1909.

Where a creditor presents a claim to the trustee joined with a statement that he has security upon the estate which it is his purpose to maintain and upon which he is entitled to priority, he institutes a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings and an appeal lies to the Circuit Court of Appeals under § 25*b*, and the party aggrieved is not limited by § 24*b* to a petition for revision; and an appeal also lies to this court, under the rules prescribed by it, if the amount involved exceeds $2,000 and the question involved is one which gives jurisdiction to this court to review judgments of the state courts under § 709, Rev. Stat., or if a certificate of a justice of this court is made as required by par. 2 of subd. *b* of § 25.

General Order of this court, No. 36 in bankruptcy, which requires an appeal from a judgment of the Circuit Court of Appeals to be taken within thirty days, and that the court from which the appeal lies to make findings of fact and conclusions of law within thirty days *held* to be complied with by the Circuit Court of Appeals making findings within such thirty days, and directing them to be filed *nunc pro tunc* as of the day of entry of judgment, the appeal having also been taken within thirty days from such day of entry.

Where the claimant against a bankrupt's estate asserts a lien which would be defeated under the construction placed upon the bankruptcy act by the trustee, and the lien is allowed, a Federal question is involved, which if involved in a case in the state court would give this court jurisdiction to review the judgment under § 709, Rev. Stat., and the case is appealable from the Circuit Court of Appeals to this court under § 25*b* of the bankruptcy act.

On appeals from the Circuit Court of Appeals under § 25*b* this court, under par. 3 of General Orders in Bankruptcy No. 36, can only look at the facts found by the Circuit Court of Appeals.

An attempt to prefer is not necessarily an attempt to defraud, nor is a

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preferential transfer always a fraudulent one. The question of fraud depends upon the motive, and in order to invalidate a conveyance as one made to hinder, delay or defraud creditors within the meaning of § 67*e* of the bankruptcy act actual fraud must be shown.

In this case a mortgage given within four months of filing the petition to secure advances and while the mortgagee did not know of the mortgagor's insolvency, although the latter did, and which mortgage was found not to have been made with intent to hinder, delay or defraud creditors, *held* not to be voidable under § 67*e* of the bankruptcy law and that the mortgagee was entitled to priority thereon with interest.

152 Fed. Rep. 943, affirmed.

THE facts, which involve the construction of certain provisions of the bankruptcy act, are stated in the opinion.

*Mr. Myron L. Learned,* for appellant:

This controversy was one "arising in bankruptcy proceedings" and was therefore appealable under § 24*a* of the bankruptcy act. *Hewit* v. *Berlin Machine Works,* 194 U. S. 296; *Dodge* v. *Norlin,* 133 Fed. Rep. 363, and cases there cited; *In re McKenzie,* 142 Fed. Rep. 383; *In re Holmes,* 142 Fed. Rep. 391; *Hendricks* v. *Webster,* 159 Fed. Rep. 927; *Burleigh* v. *Foreman,* 125 Fed. Rep. 217; *Smith* v. *Means,* 148 Fed. Rep. 89; *Mason* v. *Wolkowich,* 150 Fed. Rep. 699; *Security Warehousing Co.* v. *Hand,* 143 Fed. Rep. 32; *Hinds* v. *Moore,* 134 Fed. Rep. 221; *McCarty* v. *Coffin,* 150 Fed. Rep. 307; *In re McMahon,* 147 Fed. Rep. 684; *In re Mueller,* 135 Fed. Rep. 711.

The intent and purpose to hinder, delay or defraud creditors are to be presumed from the giving of the mortgage of May 2, 1904, when its necessary effect was to so hinder, delay or defraud. *Crow* v. *Beardsley,* 68 Missouri, 439; *Wager* v. *Hall,* 16 Wall. 584; *Johnson* v. *Wald,* 93 Fed. Rep. 640; *In re McGee,* 105 Fed. Rep. 895; *Toof* v. *Martin,* 13 Wall. 40; *Wilson* v. *City Bank,* 17 Wall. 473; *Western Tie & Timber Co.* v. *Brown,* 196 U. S. 502; *In re Ed. W. Wright Lumber Co.,* 114 Fed. Rep.

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1011; *In re Platts*, 110 Fed. Rep. 126; *In re McLam*, 97 Fed. Rep. 922; *Pollock* v. *Jones*, 124 Fed. Rep. 163; *In re Gutwillig*, 92 Fed. Rep. 337; *S. C.*, 90 Fed. Rep. 475.

Conceding that the claimant had no knowledge of the bankrupt's true financial condition on May 2, 1904, still the mortgage is void under the provisions of § 67*a* of the bankruptcy act. *Wilson Bros.* v. *Nelson*, 183 U. S. 191; *In re Richards*, 96 Fed. Rep. 935; *Pirie* v. *Trust Co.*, 182 U. S. 438; *Thompson, Trustee*, v. *Fairbanks*, 196 U. S. 516; *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356; *Morgan et al.* v. *First National Bank of Mannington*, 145 Fed. Rep. 466; *Pollock* v. *Jones*, 124 Fed. Rep. 163.

The validity of a mortgage given within four months preceding bankruptcy, to secure a preëxisting, unsecured indebtedness, has been passed on and denied in many cases. *City National Bank* v. *Bruce* (C. C. A.), 109 Fed. Rep. 69; *In re Sanderlin*, 109 Fed. Rep. 857; *In re Jones*, 118 Fed. Rep. 673; *In re Sawyer*, 130 Fed. Rep. 384; *In re Cobb*, 96 Fed. Rep. 821; *In re Belding*, 116 Fed. Rep. 1016; *In re Wolf*, 98 Fed. Rep. 84; *In re Gutwillig*, 90 Fed. Rep. 475; *In re Durham*, 114 Fed. Rep. 750; *Davis* v. *Turner*, 120 Fed. Rep. 605; *In re Pease*, 129 Fed. Rep. 447.

The amount allowed claimant by the Circuit Court of Appeals is excessive.

The Court of Appeals has computed and allowed interest to March 1, 1906, on the amount found due Arts, instead of to July 27, 1904.

The claim of Arts being provable only as an unsecured claim, interest should have been allowed on the amount found due only to July 27, 1904, the date when the petition was filed. Section 63 of the bankruptcy act of 1898; U. S. Comp. Stat. 1901, p. 3447.

*Mr. George S. Wright*, with whom *Mr. Robert E. O'Hanly* was on the brief, for appellee:

No appeal lay from the District Court to the Court of Appeals,



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under § 25*a* of the bankruptcy act or otherwise, hence there can be no appeal to this court. *In re Worcester County*, 102 Fed. Rep. 808; *Morgan* v. *Bank*, 145 Fed. Rep. 466; *In re Whitener*, 105 Fed. Rep. 180; *In re Abraham*, 93 Fed. Rep. 767; *In re Mueller*, 135 Fed. Rep. 711; *In re First National Bank of Louisville*, 155 Fed. Rep. 100; *In re McMahon*, 147 Fed. Rep. 684; *In re Rouse, Hazard & Co.*, 91 Fed. Rep. 96; *In re Cosmopolitan Power Co.*, 137 Fed. Rep. 858; *Gaudette* v. *Graham*, 164 Fed. Rep. 311; *Hutchinson* v. *Otis*, 190 U. S. 552, 555; *First National Bank* v. *Trust Company*, 198 U. S. 280.

No appeal lies from the decision of the Court of Appeals, under § 25*b* of the bankrupt act or otherwise, because the question of allowance or rejection of a claim is not involved.

No appeal lies from the decision of the Court of Appeals, under § 25*b* of the bankrupt act or otherwise, because the question involved is not one that might have been taken on appeal or writ of error from the highest court of a State to this court. *Chapman* v. *Bowen*, 207 U. S. 89.

As used in the act, the words "with intent to hinder, delay or defraud creditors" do not cover cases in which conveyances are made with the honest purpose on the part of the debtor, though insolvent, of paying or securing a debt. The conveyance denounced is one specially intended by the maker to have the effect of hindering and delaying creditors in the satisfaction of their claims, a contrivance for the purpose of protecting his property. It does not cover a case where a mortgage is given for the purpose of securing an honest debt, although incidentally the result may be to delay or hinder other creditors. The intent to hinder or delay must be actual, not presumed as a consequence of acts. *In re Eggert*, 43 C. C. A. 1; *S. C.*, 102 Fed. Rep. 735; *Jacobs* v. *Van Sickle*, 61 C. C. A. 598; *S. C.*, 127 Fed. Rep. 62; *Lansing* v. *Ryerson*, 63 C. C. A., 253; *S. C.*, 128 Fed. Rep. 701; *Githerns* v. *Shiffler*, 112 Fed. Rep. 505; *Hark* v. *Allen Co.*, 146 Fed. Rep. 665; *Congleton* v. *Schreifer* (N. J.), 54 Atl. Rep. 144; *In re Virginia &c. Co.*, 139 Fed. Rep. 209; Bump on Fraudulent Conveyances, 45; *Rison* v. *Knapp*, Fed.

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Cas. No. 11,861; *Summerville* v. *Milling Co.*, 142 California, 529; *Drury* v. *Cross*, 7 Wall. 299, 303; *Davis* v. *Swartz*, 155 U. S. 631, 639.

There is no presumption that a mortgage by an insolvent is given with the intent and purpose to hinder, delay or defraud creditors. Case below, 152 Fed. Rep. 947; Brandenburg on Bankruptcy (3d ed.), § 962; Loveland on Bankruptcy (2d ed.), §§ 159, 160; *Pirie* v. *Trust Company*, 182 U. S. 438, 446; *Keppel* v. *Bank*, 197 U. S. 366.

MR. JUSTICE DAY delivered the opinion of the court.

Alexander Armstrong, upon a petition in voluntary bankruptcy, was adjudicated a bankrupt by the United States District Court for the Southern District of Iowa on August 6, 1904. Josiah Coder, appellant, was duly elected and qualified as trustee. On August 26, 1904, William Arts, appellee, filed a claim for $104,880.46 against the bankrupt estate on certain promissory notes, to wit, one in the sum of $2,700.00, dated May 19, 1900, due May 19, 1901; one in the sum of $18,453.00, dated December 26, 1903, due March 26, 1904; one in the sum of $20,000.00, dated January 29, 1904, due on demand; one in the sum of $58,826.50, dated January 29, 1904, due January 30, 1905; and one in the sum of $5,512.40, dated June 17, 1904, due on demand.

It was alleged in the claim filed that the first four notes were secured by a real estate mortgage, dated May 2, 1904, covering 2,280 acres of land in Carroll County, Iowa, and the last note by a real estate mortgage of June 17, 1904, covering 615½ acres of land in Monona County, Iowa. The claimant asked for the allowance of his notes against the estate, reserving all rights to his securities in every portion thereof. The trustee filed an answer and objections to the claim of Arts, attacking both the notes and the mortgage, alleging, in substance, that the bankrupt was not indebted to the claimant in the amount named; that two of the notes were really obligations of the sons of Armstrong, signed by Arts as surety; that the mortgage was

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given to secure a preëxisting indebtedness within four months of the adjudication in bankruptcy; that at the time of the giving of the mortgage the property of the bankrupt was not at a fair valuation sufficient to pay his debts, and that he was insolvent; that the claimant or his agents knew the bankrupt's condition, or had knowledge of such facts as would put them on inquiry; that the mortgage was given with the intent and purpose to prefer claimant; that claimant or his agents had reason to believe a preference was intended; and that the mortgage was made and given within four months of the adjudication in bankruptcy with the intent and purpose to hinder, delay or defraud creditors.

Testimony was taken before the referee, and upon exceptions to his findings the case went before the District Judge, who set aside the findings of the referee, made findings of fact and entered the following order:

"It is therefore hereby ordered, adjudged and decreed that the said claim of William Arts, on account of the four notes referred to in the fourth finding of facts herein, and secured by the said mortgage of May 2, 1904, be and the same are established against the trustee and estate of Alexander Armstrong, bankrupt, and the said notes and the mortgage securing the same, are hereby declared to have been a good, valid and [enforceable] lien on the property described in said mortgage from the time of the giving and recording of said mortgage down to the time when said property was sold by the trustee in bankruptcy herein, under order of this court, discharged and free and clear of all liens, and are now a good, valid, and [enforceable] lien on the proceeds of the sale of said land in the hands of the trustee. To which said order, adjudication and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged and decreed that the said claims of the said William Arts on account of said four notes, aggregating, principal and interest, the sum of $97,497.40, as found in the fifth finding of fact, herein to be paid in full to the said William Arts, claimant, by the trustee out of the funds

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and moneys in his hands by him received on account of the sale of the lands covered by said mortgage and hereinbefore described after the payments of all prior liens and claims thereon as determined by this court. To which said order, adjudication and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged and decreed that the note and claim of $5,512.40 referred to the fourteenth finding of fact herein, be, and the same is hereby, established as against the trustee and the estate, and that as to said claim the said William Arts will participate in said estate as a general creditor. To which said order, adjudication and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged and decreed that the said mortgage of June 17, 1904, given to secure said claim of $5,512.40, be not enforced, but is hereby set aside, cancelled and held for naught, and treated as though never given, and the claimant Arts take nothing under the mortgage."

The case is reported in the District Court in 145 Fed. Rep. 202. *Sub nomine* In re Armstrong.

The trustees took the case to the Circuit Court of Appeals for the Eighth Circuit upon petition for a review and by appeal. That court dismissed the petition for review, and, after considering the appeal, sustained the findings of the District Court and affirmed its judgment, except upon the matter of interest on the notes secured by the mortgage, wherein it differed from the District Court, and held that Arts was entitled to interest on the notes to be paid out of the fund. 152 Fed. Rep. 943. This correction of interest was made upon the petition of Arts for review. An appeal was then taken to this court upon a petition for allowance of appeal, stating the allowance of the claim and the establishment of the lien thereof. The ground of appeal alleged was that the amount in controversy exceeded the sum of $2,000, and that it was a proper case to appeal from the Court of Appeals to the Supreme Court of the United States. The appeal was allowed within thirty days of the entry of the decree, and afterwards, within thirty days, an order was made

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which recited that the court had made certain findings of fact and conclusion of law, and the same were entered *nunc pro tunc* as of the date of the judgment, as follows:

"1. Alexander Armstrong filed a voluntary petition in bankruptcy on July 27, 1904, in the District Court of the United States for the Southern District of Iowa, and was adjudged a bankrupt thereon on August 6, 1904.

"2. For many years prior to May 2, 1904, he had been engaged principally in farming in Carroll County, Iowa, and on that day he owned a tract of 80 acres of land and a tract of 2,360 acres of land in that county, 616½ acres of land in Monona County, a residence and business lot in Glidden, Iowa, 200 or 300 head of cattle, 30 horses, a large number of hogs and some farm machinery. Mortgages which amounted to about $18,000 had been recorded against a part of the land in Carroll County, and the land in Monona County had been traded for in April, 1904, and taken subject to one-half of a mortgage for $40,000. All of the other property was free from incumbrance. But the residence in Glidden was his homestead and exempt from execution.

"3. William Arts was the sole owner of a state bank in Carroll, Iowa, which he opened in 1898, and his son, W. A. Arts, was the cashier. In June, 1898, the bank commenced loaning money to Armstrong, and continued to loan moneys to him in amounts varying from $20,000 to a few hundred dollars at a time, and to renew old loans, until on May 2, 1904, Armstrong owed Arts $98,503.32 evidenced by notes, and $2,000 evidenced by an overdrawn account in the bank. This indebtedness had been increasing steadily from June, 1898, by reason of the new loans and the accrual of interest. Armstrong first opened an account in Arts' bank in April, 1900. Prior to that time he had kept an account in another bank in Carroll, in which Arts had owned a large interest up to the time he opened his own bank, in 1898.

"4. Armstrong had the reputation of being one of the wealthiest men in Carroll County, and no security had been required

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of or given by him to Arts until May 2, 1904, when he gave a mortgage on 2,360 acres of his land in Carroll County to secure the payment of $98,503.22 evidenced by his notes, and this mortgage was recorded on May 3, 1904. It was executed at the request of the cashier of the bank, or at the request of his brother, who had been called home by reason of the serious illness of their father, William Arts.

"5. Armstrong was insolvent on May 2, 1904, when he gave the mortgage to Arts, and he then knew that he was insolvent.

"6. Neither Arts nor any of his agents acting therein knew or had reasonable cause to believe that Armstrong was insolvent when he gave the mortgage of May 2, 1904, nor did Arts or any of his agents acting therein then have reasonable cause to believe that it was intended thereby to give him a preference over other creditors by the execution of that mortgage.

"7. Armstrong did not make the mortgage of May 2, 1904, with any intent or purpose on his part to hinder, delay or defraud his creditors or any of them.

"8. There is due to the appellee on the notes secured by the mortgage of May 2, 1904, with interest to March 1, 1906, the sum of $109,107.56, and this amount should be paid to appellee by the appellant out of the funds and moneys in his hands which he received on account of the sale of the lands covered by that mortgage.

*Conclusions of Law.*

"1. The mortgage of May 2, 1904, is not voidable by the trustee under sections 60*a* and 60*b* of the bankruptcy law, because neither Arts nor his agents acting therein had reasonable cause to believe that it was intended thereby to give a preference.

"2. The mortgage of May 2, 1904, is not null or void as against the creditors of the mortgagor, Armstrong, under section 67*e*, because it was not made with the intent or purpose on his part to hinder, delay or defraud his creditors or any of them.

"3. The giving of the mortgage of May 2, 1904, to Arts did

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not as a matter of law constitute any evidence of any intent on the part of the bankrupt to hinder, delay or defraud other creditors within the meaning of section 67*e*, notwithstanding the fact that its necessary effect was to hinder and delay other creditors and to deprive them of an opportunity they might otherwise have had to collect larger portions of their claims.

"4. The mortgage of May 2, 1904, though given within four months of the adjudication in bankruptcy to secure a preëxisting unsecured indebtedness was valid, and the appellee should be paid $109,107.56 out of the proceeds of the sale of the mortgaged property."

It is contended by the appellee that the case should be dismissed for want of jurisdiction of the Circuit Court of Appeals and of this court. Questions of the jurisdiction in bankruptcy, particularly of the appellate courts, have given rise to numerous and not altogether reconcilable decisions. The bankruptcy act, as originally passed, did not give the bankruptcy courts jurisdiction over plenary suits to recover the property alleged to belong to the trustee in bankruptcy, except with the consent of the defendant. This was the subject of full consideration and determination in *Bardes* v. *The Bank*, 178 U. S. 524. Subsequent decisions of this court construed the act to give the bankruptcy courts jurisdiction over controversies concerning the property in possession of the bankruptcy courts. *Whitney* v. *Wenman*, 198 U. S. 539; *Murphy* v. *John Hoffman, Co.*, 211 U. S. 562.

Section 24 of the bankruptcy act provides:

"*a*. The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any

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organized circuit of the United States and from the Supreme Court of the District of Columbia.

"*b*. The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend or revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

By paragraph *b* of § 24 the Circuit Courts of Appeals have jurisdiction to superintend and revise in matters of law, proceedings of the several inferior courts of bankruptcy within their jurisdiction. The proceeding under this section is designed to enable the Circuit Court of Appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (§ 24), or the special appeal given in certain cases under § 25.

Section 25 of the act provides for appeals in bankruptcy proceedings, and in such proceedings appeals may be taken from the courts of bankruptcy to the Circuit Courts of Appeals in three classes of cases.

We are concerned in this case with the third class, "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." The appeal must be taken within ten days after the judgment.

It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

A reference to the adjudications in this court may assist in clearing the matter. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, is an illustration of a controversy arising in bankruptcy proceedings (§ 24*a*) wherein the appeal is under § 6 of the act of March 3, 1891. In that case the Berlin Machine Works

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asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under § 6 of the act of March 3, 1891. Nor is the decision in *Hewit* v. *Berlin Machine Works* inconsistent with *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the District Court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession, and it was held that when this fact appeared the District Court had no longer jurisdiction of the case under the doctrine laid down in *Bardes* v. *Bank*, *supra*, and ought to have dismissed the case.

We are thus brought to the determination of the question, Was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking? The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: "The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the cost, if any, of collecting payment thereof out of said property held as security."

He thus in effect presented to the trustee in bankruptcy a

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claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewit* v. *Berlin Machine Works, supra; York Manufacturing Company* v. *Cassell,* 201 U. S. 344; *Security Warehousing Co.* v. *Hand,* 206 U. S. 415, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings.

It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson* v. *Otis,* 190 U. S. 552. In that case Otis, Wilcox & Company, having a claim for $4,421.64, had sued and attached the bankrupt's property within four months of filing the petition in bankruptcy. Otis, Wilcox & Company, supposing their attachment good, took judgment by default and collected their debts from the attached parties, the trustee agreeing to save them harmless from liability; satisfaction was entered in each suit. Subsequently the trustee demanded payment of these debtors of the bankrupt, and, as they had no defense, Otis, Wilcox & Company paid to the trus-

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tee the amount of the debts. Otis, Wilcox & Company then filed a claim in bankruptcy, which was allowed in the lower court; and they asserted a lien upon the bankrupt estate. After disposing of the question of the effect of the satisfaction, and deciding that the claim was provable, speaking of the asserted lien, this court said:

"Under the circumstances of this case it seems to us that the petition [asserting the lien] was incident to the claim, *Cunningham* v. *German Insurance Bank*, 101 Fed. Rep. 977; *S. C.*, 4 Am. Bank. Rep. 192, and was a bankruptcy proceeding under section 2, cl. 7, within the meaning of section 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not, 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over,' within section 25*a*, 3, and was not an independent ground of appeal. See *In re Whitner*, 105 Fed. Rep. 180, 186; *In re Worcester County*, 102 Fed. Rep. 808, 813; *In re Rouse, Hazard & Company*, 91 Fed. Rep. 96; *In re York*, 4 N. B. R. 479, 483. If the question should be held to come up as an incident to the appeal on the proof, *Cunningham* v. *German Insurance Bank, supra*, we see no error in the decree of the District Court."

The contest in the Otis case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate.

It is insisted, however, that inasmuch as the trustee in the case at bar made no objection to the amount found due upon the notes by the District Court, and only sought by his appeal to further contest the right to the security asserted by Arts, that his sole remedy was under § 24*b*—to have a revision in the Circuit Court of Appeals by a petition filed for that purpose, and that the Circuit Court of Appeals should have dismissed the attempted appeal. But we are of opinion that the character of the proceeding must be determined by the nature of the claim set up against the trustee in bankruptcy, and as § 25*b* gives an appeal to the Court of Appeals from a judgment allowing or rejecting a debt or claim of $500 or over, that the ap-

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peal was properly allowed in this case, and brought before the Circuit Court of Appeals the validity of the claim and the lien asserted securing the debt.

The question remains, Has this court jurisdiction by appeal from the Circuit Court of Appeals? This depends upon subdivision *b* of § 25, giving an appeal, under such rules as may be prescribed by this court, where the amount in controversy exceeds the sum of $2,000, and the question involved is one which might have been taken on appeal or writ of error from the highest court of the State to this court; or where some Justice of this court shall make a certificate, as required under paragraph 2 of subdivision *b*. As there is no such certificate, the question is, Was the appeal taken within the time prescribed by the rules of this court, and is the question involved one which might have been taken on appeal or writ of error from the highest court of the State to this court? The general order in bankruptcy No. 36 provides that appeals under the act from the Circuit Court of Appeals to this court shall be taken within thirty days after the judgment or decree, and that in every such case "the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law." The appeal was taken within the thirty days. The Circuit Court of Appeals made the findings of fact and conclusions of law part of the record by an order, made within thirty days, directing the same to be filed *nunc pro tunc* as of the date the judgment entered. It is insisted that this is not a compliance with the rule that requires the findings to be made at or before the time of entering its judgment or decree. But we think that the court must be presumed to have acted within its authority to correct the record by this order made within the time allowed for an appeal to make it show the findings at or before the time of entering the judgment.

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Is the case one which might have been taken to this court upon appeal or writ of error from the highest court of the State? We are of opinion that it is. In determining the validity of the lien asserted to secure the claim a construction of the bankruptcy act is directly involved. A construction of the act is insisted upon by the appellant which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case, had the case been in the state court, it might have been brought here for review under § 709 of the Revised Statutes. *Rector* v. *The City Deposit Bank*, 200 U. S. 405; *St. Louis & Iron Mountain R. R. Co.* v. *Taylor*, 210 U. S. 281, 293. It is contended that a contrary ruling was made in *Chapman, Trustee*, v. *Bowen*, 207 U. S. 89. But, in concluding the opinion of the court in that case, Mr. Chief Justice Fuller said:

"The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of section 709, Rev. Stat., the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute. *Jersey City & Bergen Railroad Company* v. *Morgan*, 160 U. S. 288."

We, therefore, reach the conclusion that the claim presented instituted a proceeding in bankruptcy, and, being for over $500 it was appealable to the Circuit Court of Appeals, bringing to that court the validity of the asserted lien, and that appeal lies to this court under § 25*b*, as the claim exceeded $2,000, and, with the lien asserted thereon, presented a case for the construction of the bankruptcy act which might have been brought here under § 709 of the Revised Statutes had the case been decided by the highest court of the State. We, therefore, entertain the case upon its merits, and will proceed to examine the validity of the lien asserted under the mortgage to Arts upon the facts found by the Circuit Court of Appeals.

In an appeal of this character we can look only at the facts

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found by the Circuit Court of Appeals. General Orders in Bankruptcy, 36, paragraph 3. The question before us is, upon the findings of fact made by the Circuit Court of Appeals, Should the mortgage to Arts of May 2, 1904, securing the sum of $98,503.32, have been invalidated? The mortgage was placed on a large tract of land in Carroll County, Iowa. The record discloses that this was not all the property of the bankrupt. Just what the other property was worth above incumbrances does not definitely appear. It does appear, however, that the bankrupt owned a residence and business lot in Glidden, Iowa, 200 or 300 head of cattle, thirty horses, a large number of hogs and some farm machinery, unincumbered. And it is specifically found that although Armstrong was insolvent on May 2, 1904, and knew that he was insolvent, neither the mortgagee nor any of his agents knew or had reasonable cause to believe that Armstrong was then insolvent; nor did Arts or any of his agents then have reasonable cause to believe that it was intended thereby to give a preference over other creditors by the execution of the mortgage. It is further specifically found that Armstrong did not make the mortgage in question with any intent or purpose on his part to hinder, delay or defraud his creditors, or any of them. The decision of the case requires consideration of certain sections of the bankruptcy act. Section 60, subdivision *a*, provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months of the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such a judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Such preferences may be set aside under the condition named in subdivision *b* of § 60, which is as follows:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting

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therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Manifestly this conveyance could not be set aside under the provisions of § 60*b*. For, while it is true that under the facts found the conveyance might be deemed a preference, as a transfer of property which would have the effect of enabling one creditor to obtain a larger percentage of his debt or claim than other creditors of the same class, yet, as it is distinctly found, that neither the mortgagee nor his agent had any reasonable cause to believe that it was intended to give a preference, the same could not be avoided under § 60*b*.

The reliance in this case is upon § 67*e* of the act. This section, so far as it is necessary to consider it, reads as follows:

"*d*. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

"*e*. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

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It is the contention of the appellant that as the necessary consequence of the giving of the mortgage under consideration was to hinder, delay or defraud creditors of the bankrupt in the collection of their debts, Armstrong must be presumed to have intended such consequences, and the mortgage is therefore voidable.

A consideration of the provisions of the bankruptcy law as to preferences and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in § 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the bankruptcy act this distinction must be kept constantly in mind. As was said in *Githens* v. *Shiffler*, 112 Fed. Rep. 505: "An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one." In *In re Maher*, 144 Fed. Rep. 503–509, it was well said by the District Court of Massachusetts:

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him."

Is the conveyance voidable under subdivision *e*, § 67? Under the terms of that subdivision a fraudulent conveyance is made void as to creditors, except as to grantees in good faith and for a present fair consideration. The provision saving conveyances to purchasers in good faith and for a present fair consideration prevents such conveyances from being declared void



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by the act, although they have been made by the bankrupt with the intent on his part to hinder, delay or defraud his creditors. But the act does not dispense with the necessity of showing, to avoid a conveyance or transfer under § 67*e*, that the bankrupt had the actual intent to hinder, delay or defraud creditors. What is meant when it is required that such conveyances in order to be set aside shall be made with the intent on the bankrupt's part to hinder, delay or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying or defrauding creditors. The question of fraud depends upon the motive. Kerr on Fraud and Mistake, 196, 201. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. *Stewart et al.* v. *Dunham et al.*, 115 U. S. 61; *Huntley* v. *Kingman*, 152 U. S. 527.

We are of opinion that Congress, in enacting § 67*e*, and using the terms "to hinder, delay or defraud creditors," intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In § 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in § 67*e*, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in § 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701. Considering the lan-

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guage, which is identical with that in § 67*e*, the Circuit Court of Appeals, speaking through Judge Severens, said:

"The language of subsection 1 of section 2 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens* v. *Shiffler*, 112 Fed. Rep. 505. And so construed, the test of the conveyance intended by subsection 1 of section 3 is that of the *bona fides* of the transfer. Loveland's Bank., 2 ed., sec. 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden by such statutes, notwithstanding that the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."

And to the same effect is the decision of the Circuit Court of Appeals of the Second Circuit in *In re Bloch*, 142 Fed. Rep. 674, 676, in which that court had occasion to consider the meaning of § 67*e*, as applicable to § 57*g*, of the act as amended in 1903, requiring the surrender of preferences voidable under § 60, subdivision *b*, or of fraudulent conveyances voidable under § 67*e*, in order to make proof of a claim, and in considering § 67*e*, Judge Townsend, speaking for the court, said:

"We think Congress must be presumed to have intended by the introduction of section 67*e* to require a surrender only of such transfers as would have been fraudulent at common law, or would constitute an act of bankruptcy under section 3 of the act. In *Githens* v. *Shiffler*, *supra*, the bankrupt used the proceeds of a sale of property to prefer certain creditors. The court, upon a review of the authorities, held that section 3 applied only to those transfers which, according to the established course of authority, constituted a fraudulent transfer at the time of the passage of the bankruptcy act, and held that a mere preferential transfer, as distinguished from a fraudulent one, was not an act in bankruptcy under said section 3.

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"The question as to whether a transfer is made with intent to hinder, delay or defraud depends upon whether the act done is a *bona fide* transaction. Loveland on Bankruptcy, 391; *Cadogan* v. *Kennet*, 2 Cowper, 435; *Lansing Boiler and Engine Works* v. *Ryerson*, *supra*. An intent to defraud is the test of the right to avoid a transfer under section 67*e*."

In dealing with this question this court said, in *Thompson* v. *Fairbanks*, 196 U. S. 516:

"There is no finding that in parting with the possession of the property the mortagor had any purpose of hindering, delaying or defrauding his creditors or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property under the provisions of section 67*e*, of the bankruptcy law."

That it is essential to show actual fraud in order to invalidate conveyances under § 67*e*, is the view of the textwriters upon this subject. Loveland on Bankruptcy (3d ed.), 476; Collier on Bankruptcy (6th ed.), 562; 1 Remington on Bankruptcy, § 1498.

We do not agree, if such is to be held the effect of the third conclusion of law in the finding of the Court of Appeals, that the giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud. What we hold is that to constitute a conveyance voidable under § 67*e*, actual fraud must be shown.

How, then, stands the case at bar? As we have already said, we must decide this case upon the facts found in the Circuit Court of Appeals, and it is therein found that in making the mortgage in question, Armstrong had no intention to hinder, delay or defraud his creditors. In view of the finding of the Circuit Court of Appeals, it may be that Armstrong, though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness. Such conveyances were valid at the common law and under the statute from which this feature of the law was taken, and, while Congress in the

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bankruptcy act strikes down preferential conveyances which come within its terms where the party preferred has good reasons to believe that a preference is intended, it has not declared voidable merely preferential conveyances made in good faith and in which the grantee, as is found in this case, was ignorant of the insolvency of the grantor, and had no reason to believe that a preference was intended. Nor do we think the Circuit Court of Appeals erred in holding that inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt. Finding no error in the judgment of the Court of Appeals, the same is

*Affirmed.*

## COMMERCIAL MUTUAL ACCIDENT COMPANY v. DAVIS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 114. Argued March 15, 16, 1909.—Decided April 5, 1909.

Where the defendant makes no appearance in the state court or in the Circuit Court except for the purpose of raising the question of jurisdiction and removing the case to the Federal court, such proceedings do not amount to a general appearance.

A State may require a foreign insurance corporation not having any regular office in the State to make its agents who have authority to settle losses in the State competent to receive notice of actions concerning such losses.

In order for a state court to obtain jurisdiction over a foreign corporation having neither property nor agent within a State it is essential for the corporation to be doing business in the State.

An insurance company with outstanding policies in a State on which it collects premiums and adjusts losses *held*, in this case, to be doing business within that State, so as to render it liable to an action, and that service, according to the law of the State, on a doctor sent to investigate the loss and having power to adjust the same is sufficient to give the state court jurisdiction.

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While service of process on one induced by artifice or fraud to come within the jurisdiction of the court will be set aside, this court will not reverse the finding of the trial court that there was no such fraud where, as in this case, there is testimony supporting it.

Under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, this court has jurisdiction to review cases certified in which the question of jurisdiction is alone involved and under the power conferred by that statute can reverse the court below, when clearly wrong, even upon questions of fact.

THE facts are stated in the opinion.

*Mr. Jules C. Rosenberger*, with whom *Mr. James C. Jones* and *Mr. Kersey Coates Reed* were on the brief, for plaintiff in error:

It is essential to support the jurisdiction of the court to render a personal judgment against a foreign corporation: That at the time of service of the summons the corporation was engaged in business in the State; that the person upon whom service was had stood in a representative character to the company, that his employment was general, not special, and that his duties were not limited to those of a subordinate employé nor to a particular transaction; and that such person was not lured or enticed into the State, or authority conferred upon him through any trick or device employed by the plaintiff. *St. Clair* v. *Cox*, 106 U. S. 350; *Frawley* v. *Penn. Casualty Co.*, 124 Fed. Rep. 259; *Goldey* v. *Morning News*, 156 U. S. 522; *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100; *Conley* v. *Alkali Works*, 190 U. S. 406; *Geer* v. *Alkali Works*, 190 U. S. 428; *Remington* v. *Railroad Co.*, 198 U. S. 95.

The defendant was not and is not doing business in this State. Isolated or sporadic transactions, taking place between a foreign corporation and citizens of a State are not a doing or carrying on of business within that State, even where the transaction is of such a character as to constitute a part of the ordinary business of the corporation. *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Frawley* v. *Ins. Co.*, 124 Fed. Rep. 264, and cases

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cited; *Louden Machinery Co.* v. *Amer. Iron Co.*, 127 Fed. Rep. 1008; *Romaine* v. *Ins. Co.*, 55 Fed. Rep. 751; *Hazeltine* v. *Ins. Co.*, 55 Fed. Rep. 743; *St. Louis Wire Co.* v. *Consol. Wire Co.*, 32 Fed. Rep. 802; *United States* v. *Telephone Co.*, 29 Fed. Rep. 37, 41; *Carpenter* v. *Air Brake Co.*, 32 Fed. Rep. 434; 19 Cyc. 1268.

Much more so is this true where, as in this case, the business transacted was wholly by mail which does not constitute a doing of business in the State. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Marine Ins. Co.* v. *St. L. Ry. Co.*, 41 Fed. Rep. 643; *Hazeltine* v. *Ins. Co.*, 55 Fed. Rep. 743; *Romaine* v. *Ins Co.*, 55 Fed. Rep. 751; *Cæsar* v. *Cahill*, 83 Fed. Rep. 403; *East Bldg. & Loan* v. *Bedford*, 88 Fed. Rep. 7; *Neal* v. *New O. Assn.*, 100 Tennessee, 607; *Frawley* v. *Penna. Cas. Co.*, 124 Fed. Rep. 259.

Where the agency of the person served is casual or temporary or confined to a particular purpose, he cannot be held, in law, an agent to receive service of process on behalf of the corporation. *St. Clair* v. *Cox*, 106 U. S. 350; *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Louden Mach. Co.* v. *Amer. Iron Co.*, 127 Fed. Rep. 1008, per McPherson, J., disapproving *Houston* v. *Filer Co.*, 85 Fed. Rep. 757; *Mex. Central Ry.* v. *Pinkney*, 149 U. S. 194; *Maxwell* v. *Railroad Co.*, 34 Fed. Rep. 286; *Frawley* v. *Pa. Casualty Co.*, 124 Fed Rep. 265; *Wall* v. *C. & O. Ry. Co.*, 95 Fed. Rep. 398.

If a person is induced by artifice to come within the jurisdiction of a court for the purpose of having process served upon him and process is there served, it is such an abuse that the court will, on motion, set the process aside. *Fitzgerald Const. Co.* v. *Fitzgerald*, 137 U. S. 98; *Frawley* v. *Penna. Casualty Co.*, 124 Fed. Rep. 259; *Louden Mach. Co.* v. *Amer. Iron Co.*, 127 Fed. Rep. 1008; *Cavanaugh* v. *Manhattan Transit Co.*, 133 Fed. Rep. 818.

The sheriff's return does not show a valid service under the local statute under which it was attempted to be made, § 7992, Rev. Stat. Mo., 1899, which provides that service may be made upon any person "who adjusts or settles a loss or pays the same

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for such insurance corporation, or in any manner aids or assists in doing either." No loss was adjusted, settled or paid in the State. This loss having never been adjusted, settled or paid, it cannot be said that he has in any manner "aided" or "assisted" in so doing, as "assist" necessarily means that the act attempted has been effected. *Hurst* v. *State*, 79 Alabama, 55, 57.

The Federal courts in determining their jurisdiction are not bound by any local statute or decision, but will determine on principles of general jurisprudence whether the company is doing business in the State and whether the person served is such an agent as is truly representative of the corporation. *St. Clair* v. *Cox*, 106 U. S. 350; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Spratley* v. *Ins. Co.*, 172 U. S. 602; *Frawley* v. *Pa. Casualty Co.*, 124 Fed. Rep. 259, and cases cited.

*Mr. William C. Scarritt*, with whom *Mr. Elliott H. Jones* and *Mr. Edward L. Scarritt* were on the brief, for defendant in error:

The finding of the lower court that the plaintiff in error was doing business in the State of Missouri, and that there was no fraudulent enticement of defendant below into this State, and that due service of the process upon the defendant had been made, is, upon this record, conclusive upon this court. *Russell* v. *Ely*, 2 Black, 575, 580; *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593; *United States* v. *Copper Queen Mining Co.*, 185 U. S. 495, 497; *Jeffries* v. *Mutual Life Insurance Co.*, 110 U. S. 305; *Hyde* v. *Booraem*, 16 Pet. 169, 176; *Parks* v. *Turner*, 12 How. 39, 43; *St. Louis* v. *Rutz*, 138 U. S. 226, 241; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 253; *Cooper* v. *Omohundro*, 19 Wall. 65, 69; *Mann* v. *Rock Island Bank*, 11 Wall. 650, 652.

The general finding of the court in favor of the service is fully supported by the proof.

The return of the officer as to the service of the summons, and the finding of the court in its judgment as to the facts of that service are at least *prima facie* evidence of the facts so recited.

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Alderson on Judicial Writs and Process, 530; Murfree on Sheriffs, § 866*a*; 18 Ency. of Pleading & Practice, 963.

The sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is sufficient in law. *Carr* v. *Bank*, 16 Wisconsin, 50; *Bond* v. *Wilson*, 8 Kansas, 228; *Crosby* v. *Farmer*, 39 Minnesota, 305; *S. C.*, 40 N. W. Rep. 71; *Walker* v. *Lutz*, 14 Nebraska, 274; *S. C.*, 15 N. W. Rep. 352; *Wendell* v. *Mugridge*, 19 N. H. 109; *Stout* v. *Railroad Co.*, 3 McCrary, 1; *S. C.*, 8 Fed. Rep. 794; *Van Rensselaer* v. *Chadwick*, 7 How. Prac. 297; *Wallis* v. *Lott*, 15 How. Prac. 567; *Watson* v. *Watson*, 6 Connecticut, 334; *Rowe* v. *Water Co.*, 10 California, 442; *Wall* v. *Chesapeake & O. Ry. Co.*, 95 Fed. Rep. 398, 404.

Under the Missouri practice the return of the officer is conclusive as to the facts recited. And he is liable upon his official bond for false return. *Newcomb* v. *New York Central & H. R. R. Co.*, 182 Missouri, 687; *Phillips* v. *Evans*, 64 Missouri, 17; *Regent Realty Co.* v. *Armour Packing Co.*, 112 Mo. App. 271.

Upon a fair construction of all the proof submitted, the sheriff's return was good in law and the Missouri court had jurisdiction of the person of defendant. *Pennsylvania Lumbermen's Mutual Fire Ins. Co.* v. *Meyer*, 197 U. S. 407; *Houston* v. *Filer & S. Co.*, 85 Fed. Rep. 757; *Conn. M. L. I. Co.* v. *Spratley*, 172 U. S. 602; *Chattanooga Nat. B. & L. Assn.* v. *Denson*, 189 U. S. 408; *Funk, Adm.*, v. *Anglo-American Ins. Co.*, 27 Fed. Rep. 335; *St. Clair* v. *Cox*, 106 U. S. 350; *Bates* v. *Scott*, 26 Mo. App. 430.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents a question of the jurisdiction of the Circuit Court of the United States to entertain a suit brought by Mary B. Davis, defendant in error, plaintiff below, against the

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Commercial Mutual Accident Company, plaintiff in error, defendant below. The case comes here upon a certificate involving the question whether the defendant company was duly served with process. The Circuit Court found that the service of summons was valid and sufficient to give it jurisdiction, and overruled a motion to set aside the service and dismiss the action for want of jurisdiction.

The suit was commenced by Mary B. Davis in the Circuit Court of Howard County, Missouri, and was removed to the Circuit Court of the United States for the Central Division of Western Missouri by the defendant, a Pennsylvania corporation. The company made no appearance in the court below or in the state court, except for the purpose of raising the question of jurisdiction, and removing the case to the Federal court. Such proceedings did not amount to a general appearance in the suit. *Goldey* v. *Morning News*, 156 U. S. 518; *Wabash Western Rwy.* v. *Brow*, 164 U. S. 271.

The record contains a bill of exceptions, setting forth the testimony upon the question of jurisdiction. It appears that A. F. Davis, husband of the plaintiff, held a policy in the defendant company, issued August 6, 1896, in the sum of $5,000, insuring against accidental death. On December 31, 1906, he received a gunshot wound, from which he died on the fourth of January, 1907. On January 7, 1907, the insurance company was notified of the death. On January 14 and 15 one Dr. Mason, of Chicago, went to the city of Fayette, Missouri, the home of the plaintiff, and there made an investigation of the cause of death in defendant's behalf, and demanded an inspection of the body of the deceased, which demand was refused. Some correspondence ensued between the plaintiff and the defendant company, and, on February 20, a letter was written, signed by the plaintiff, which letter contained, among other things, the following:

"However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have

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been paid, and I am very anxious to have the balance settled as soon as possible.

"Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send some one as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance."

To this letter the company replied, by a letter written by its secretary at the Philadelphia office, that it would have its medical representative in Fayette with authority to make an adjustment. Afterwards, on February 27, Dr. Mason went to Fayette, having received a written letter of authority from the company authorizing him to act on behalf of the company in the examination of the body of the deceased, which letter also authorized him to adjust the claim.

The testimony is not altogether in harmony as to what occurred at the meeting of February 27. It does appear that the representative of the plaintiff and Dr. Mason met and conferred upon the matter of compromising the claim, and that afterwards an offer was made by the plaintiff's representatives to proceed with an examination of the body of the deceased. Dr. Mason declined this offer until he could have another physician present; and after some negotiation a deputy sheriff appeared and served process upon Dr. Mason as agent of the company, upon a petition which had been prepared before his arrival, and which was filed in the case subsequently removed to the Federal court. There is also testimony tending to show that a physician was present, who was ready to assist in the examination of the body as a representative of the plaintiff.

The grounds of objection to the service in the case may be summarized to be: first, that Mason was not a person authorized to receive service of process on defendant's behalf; second, that at the time the service was attempted the defendant company was not engaged in the transaction of business in the State of Missouri; third, that Dr. Mason was enticed into the State of

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Missouri by the trick and device of the plaintiff; fourth, that the return of service did not disclose a valid service under the laws of the United States nor of the State of Missouri.

As to the service of summons, the statutes of Missouri provide (Revised Statutes of Missouri, 1899, vol. 1, § 570) as follows:

"A summons shall be executed, except as otherwise provided by law, either . . . fourth, where defendant is a corporation or joint stock company, organized under the laws of any other State or country, and having an office or doing business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employé in any county where such service may be obtained, and, when had in conformity with this subdivision, shall be deemed personal service against such corporation, and authorize the rendition of a general judgment against it."

Section 7992, vol. 2, Revised Statutes of Missouri, 1899:

"Service of summons in any action against an insurance company, not incorporated under and by virtue of the laws of this State, and not authorized to do business in this State by the superintendent of insurance, shall, in addition to the mode prescribed in section 7991, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this State who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss, or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

The sheriff returned the summons as follows:

"Executed the within writ in the county of Howard and State of Missouri, on the 27th day of February, A. D. 1907, by delivering a copy of the petition in this case hereto attached and a copy of this writ to Frank G. Mason, agent of the within

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named defendant, the Commercial Mutual Accident Company, a corporation organized under the laws of the State of Pennsylvania, and doing business in the State, but having no office or place of business herein, and not incorporated under the laws of this State nor authorized to do business in this State, and while he, the said agent, was transacting business for the said defendant in our said county, and while he was adjusting or settling a loss on a policy of insurance for said defendant or was aiding and assisting in so doing.

"GEORGE D. GIBSON,
"*Sheriff, Howard County, Missouri,*
"By H. L. HUGHES, *Deputy.*"

In view of the fact that much of the business of the country is done by corporations having foreign charters and principal offices remote from States wherein they transact business, it has been found necessary to make provision for the service of summons upon local agents, in order to give jurisdiction to try controversies which have originated in such States. With this purpose in view many States have provided that foreign corporations, in order to do business within the State, must make provision for service upon some local agent, or by authority conferred upon some state officer to accept service of summons. And but for such statutes and the authority given by the States to obtain service upon local agents there could be no recovery upon the contracts of such companies, unless redress be sought in a distant State where the company may happen to have its home office. *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 619; *Railroad Company* v. *Harris*, 12 Wall. 65, 83.

In pursuance of this policy the State of Missouri has enacted the sections of its statutes providing for service upon the agents of insurance companies. In § 7992 it is provided, among other things, that service may be made by delivering a copy of the summons and complaint to any person within the State who shall solicit insurance on behalf of any insurance company, or make any contract of insurance, or who collects or receives any

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premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either. Under this section, in part at least, the sheriff undertook to make service upon Dr. Mason. The record clearly discloses that Mason had authority to adjust and settle the loss which was the subject of the plaintiff's claim. It is true that the statute says that service may be upon "any person within the State . . . who adjusts or settles the loss," etc. This language clearly has reference to the authority of the person whom the statute declares to be competent to receive service of summons, and the statute, in effect, provides that the person clothed with such power shall be capable of receiving service upon the corporation. The statute designing to reach one having the authority of the company for the purpose named, it is immaterial that the loss was not actually settled. This section (7992) is limited to the cases of companies not incorporated under the laws of the State, and not authorized to do such business within the State by the superintendent of insurance.

This law was in force when Dr. Mason came into the State clothed with full authority to settle the loss. The company must be presumed to have acted with knowledge of this statute. The company could only be served with process through some agent. It was competent for the State, keeping within lawful bounds, to designate the agent upon whom process might be served. It chose to enact a statute providing that an agent competent by authority of the company to settle and adjust losses should be competent to represent the company for the service of process. When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service, and to be vested with authority in respect to such service so far as to make it known to the foreign corporation thus coming within the State and subjecting itself to its laws. *Lafayette Insurance Company* v. *French*, 18 How. 404, 408.

It is not necessary that express authority to receive service

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of process be shown. The law of the State may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the State may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. This was held in effect in *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602.

We think the State did not exceed its power and did no injustice to the corporation by requiring that when it clothed an agent with authority to adjust or settle the loss, such agent should be competent to receive notice, for the company, of an action concerning the same.

It is further contended that the defendant company was not doing business within the State of Missouri. That it is essential, in order to obtain jurisdiction over a foreign corporation, having, as in the case at bar, neither property nor agent in the State, that it be doing business in the State is settled by numerous decisions of this court. *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Barrow Steamship Company* v. *Kane*, 170 U. S. 100; *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Lumbermen's Insurance Company* v. *Meyer*, 197 U. S. 407; *Peterson* v. *Chicago, Rock Island & Pacific Railway Company*, 205 U. S. 364.

Was the defendant doing business in the State of Missouri? The record discloses, and the court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, and at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy.

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Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; it is sufficient if it is doing business therein. We are of opinion that the finding of the court in this case is supported by testimony, and that the corporation was doing business in Missouri.

It is urged that it clearly appears from the testimony in this case that Dr. Mason was sent into the State of Missouri because of the fraud and artifice of the plaintiff, and that in such case the law will not permit a service of summons to stand. It is undoubtedly true that if a person is induced by artifice or fraud to come within the jurisdiction of the court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon proper showing. *Fitzgerald Const. Co.* v. *Fitzgerald*, 137 U. S. 98. "The fraud of the plaintiff," says the counsel for the plaintiff in error, "consisted in inducing the company by artifice to confer upon Dr. Mason authority to compromise the suit."

Upon the testimony before the court the Circuit Court reached the conclusion that the company was not induced by fraud or artifice to send Dr. Mason to the State of Missouri. This court has jurisdiction to review, under clause 5 of the act of March 3, 1891, cases in which the question of jurisdiction alone is involved, and which are duly certified here for decision. And where the decision of the court below is clearly wrong, even upon a question of fact, it may be set aside under the power conferred by the statute upon this court. We think this is the effect of the reasoning in *Goldey* v. *Morning News*, 156 U. S. *supra*; and *Mexican Central R. R. Co.* v. *Pinkney*, 149 U. S. 194.

It is contended by counsel for the plaintiff in error that the evidence is undisputed and clearly demonstrates the fraudulent conduct of the plaintiff in obtaining service in this case. But we are not prepared, on this question of fact, to say that the court below committed plain error. The court might have found upon the testimony that there was a *bona fide* attempt

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to settle the controversy between the parties, and that it was only when they failed to settle that service of summons was made upon Mason, as the agent of the company. There is testimony tending to show that both parties expected an adjustment of the claim to be made at this meeting, which was held for that purpose. There is testimony from which it might be inferred that there was a *bona fide* offer to permit an examination at that time of the remains of the deceased. We do not feel authorized to find as against the testimony set forth in the bill of exceptions, and the finding of the court below, that the purpose in writing the letter of February 20, and procuring authority to be conferred upon Dr. Mason to settle the case, and to come into the State of Missouri for that purpose, was a mere fraudulent scheme to obtain service upon the insurance company.

As the sole question before us pertains to the sufficiency of the service under the facts disclosed, we reach the conclusion that the judgment of the Circuit Court must be affirmed.

*Affirmed.*

## TURNER v. AMERICAN SECURITY AND TRUST COMPANY.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 101. Argued March 9, 10, 1909.—Decided April 5, 1909.

Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and conduct of that person, may, in addition to relating the significant instances of speech and conduct, testify to the opinion formed at the time of observation as to the mental capacity of such person.

While a general rule cannot be framed for all cases, and in clear cases of abuse the appellate court should reverse, the determination of whether a witness is qualified to state his opinion as to the mental



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condition of a testator is for the trial judge who has all the evidence and the witness before him, and in this case the trial judge does not seem to have abused his discretion as to the admission of testimony.

Evidence as to an alleged delusion of testator thirty years before execution of the will *held* to be properly excluded both because of remoteness and of the tendency to raise a collateral issue as to whether the statements connected therewith were or were not actually false.

Where the wife as caveator attacks testator's soundness of mind because he referred to himself at times as a widower and at times as divorced, an agreement of separation and a deed referring to himself as widower admitted solely to explain why testator so referred to himself *held* competent for that purpose, but evidence by the wife as to her reasons for signing the agreement and other instruments, in which she joined with her husband as his wife, were properly excluded.

The admission of incompetent evidence is not reversible error if subsequently it is distinctly withdrawn from the jury, and so *held* in this case where a letter was erroneously admitted but the presiding judge, at request of the party objecting to its admission, instructed the jury that nothing in such letter was to be taken as evidence of truth of the statements therein or even to be used for purposes of cross-examination.

29 App. D. C. 460, affirmed.

THE facts, which involve the validity of the will of Henry E. Woodbury, are stated in the opinion.

*Mr. J. J. Darlington* and *Mr. Charles F. Carusi* for appellant and plaintiff in error.

*Mr. William F. Mattingly* and *Mr. Stanton C. Peelle* for appellees and defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

In this case we are asked to review, on appeal and writ of error, a judgment of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District sitting as a Probate Court, which admitted to probate certain paper writings purporting to be the will and codicils thereto

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of Henry E. Woodbury. The decree was based upon the findings of a jury upon two issues submitted to it, namely:

"(1.) At the time of the execution of the said several paper writings propounded for probate as the last will and testament of Henry E. Woodbury, deceased, was the said Henry E. Woodbury of sound and disposing mind and capable of making a valid deed or contract?

"(2.) Was execution of said paper writings procured by the fraud or undue influence of Sallie Woodbury, Mena Stevens, or either of them, or any other person or persons?"

The jury found that the testator was of sound mind and that he was not unduly influenced. The questions brought here arose upon the trial of those issues and are stated in the bill of exceptions duly allowed. There are nineteen assignments of error, relating to the admission or exclusion of evidence, and to the instructions or refusal of instructions to the jury. There was conflicting evidence upon the issues. As no question of the sufficiency of the evidence of either party is properly here, a brief preliminary statement of facts is sufficient, and any other facts which may be needed to explain the questions of law will be stated in connection with the disposition of those questions.

According to the practice in the District in a contest of this kind, those propounding the instrument for probate are called caveatees and those opposing its probate caveators.

The testator, Henry E. Woodbury, died January 15, 1905, seventy-nine years of age. The will was executed April 11, 1902, and five codicils were executed at different times from January 5, 1903, to December 20, 1904. With slight exceptions, the will and codicils devise and bequeath the real and personal property to charities. The testator had been a physician until 1881, when an injury compelled him to cease the practice of his profession. He was childless. He had married in 1870, and in less than two years had parted from his wife, and thereafter they lived separately, though without being divorced. A sister, Sallie Woodbury, lived with him until her death, in December, 1902. After the death of the sister, Mena M. Stevens became

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his housekeeper and nurse. A nephew, Molyneaux L. Turner, was his heir and next of kin. His wife survived the testator, and, with the nephew, filed a caveat against the probate of the paper writings purporting to be a will and codicils.

1. The first eleven assignments of error relate to the admission or exclusion by the trial court of the testimony of lay witnesses as to their opinion for or against the mental capacity of the testator. In the view we take of these assignments of error they may be considered together, and without any statement as to the testimony of the several witnesses.

The rule governing the admission of testimony of this character, which has been prescribed by this court for the courts of the United States, is easy of statement and administration. Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and other conduct of that person may, in addition to relating the significant instances of speech and conduct, testify to the opinion on the mental capacity formed at the time from such observation. *Insurance Co.* v. *Rodel*, 95 U. S. 232; *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612; *Queenan* v. *Oklahoma*, 190 U. S. 548. In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury, because ordinarily it is impossible for such witness to give an adequate description of all the appearances which to him have indicated sanity or insanity. Such testimony has been well described as a compendious mode of ascertaining the result of the actual observations of witnesses. Ordinarily, and perhaps necessarily, the witness in testifying to his opportunities for observation and his actual observation relates more or less fully the instances of his conversation or dealings with the person whose mental capacity is under consideration, and it is, of course, competent, either upon direct or cross-examination, to elicit those instances in detail.

The order of the evidence must be left to the discretion of the trial judge, but when sufficient appears to convince the

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trial judge that the witness has had an opportunity for adequate observation of the person's mental capacity, and has actually observed it, then the judge may permit him to testify to his opinion. This was the course pursued by the trial judge in this case. With respect to each witness, whose testimony as to opinion was admitted or excluded, the judge exercised his discretion upon the qualifying testimony.

We are asked to review that discretion and to say that in the case of the eleven witnesses before us it was improperly exercised. We have no hesitation in declining to do this. No general rule can well be framed which will govern all cases, and an attempt to do that would multiply exceptions and new trials. The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all of the evidence and the witness himself before his face.

This is not to say that in a very clear case an appellate court ought not to review the discretion of the trial judge. For instance, if it should appear that the witness had never spoken to the testator or seen any significant act, but merely observed him driving from day to day through the streets, and the opinion of such a witness as to sanity had been received, it would be the duty of the appellate court to correct the error. On the other hand, if the witness for years had been in constant communication with the testator, had frequently conversed with him and observed his conduct from day to day, the exclusion of the opinion of the witness ought to be corrected by the appellate court. These are instances of a plain abuse of judicial discretion.

The true rule of action for an appellate court is stated in *Wheeler* v. *United States*, 159 U. S. 523. In that case this court was considering the admissibility, upon the trial of an indictment for murder, of the testimony of a boy five and a

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half years old at the time of the trial. The court, speaking by Mr. Justice Brewer, said (p. 524):

"The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

Though the question of competency in that case differed materially from the questions of competency in this case, the spirit which underlies the statement of the court there ought to govern here.

We have examined these eleven assignments of error and brought them to the test of the foregoing principles. We find that no admissions or exclusions of testimony were clearly erroneous, and accordingly all the assignments are overruled.

2. The caveators, on the issue of unsoundness of mind of the testator in 1902, and the following years, offered in evidence the record in a suit for divorce brought by the testator in 1872, and more especially that part of the record wherein he alleged, as a cause for divorce, that his wife was incapable of a valid marriage on account of a physical malformation. The physicians appointed by the court reported, after an examination of the wife, that the condition alleged did not exist. The offer of this evidence was accompanied by the contention that it showed a delusion on the part of the testator. The evidence was excluded and we think rightly, either upon the ground that it was too remote in point of time or that it would lead to a collateral inquiry whether the statement was actually false, and if so, whether it was the result of a delusion, or of malice or falsehood.

3. The caveators had introduced evidence that the testator had spoken of himself as a widower and as having been divorced

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from his wife, both of which statements were untrue. Obviously, the testimony that these statements had been made by the testator could only have been admitted as proof of mental unsoundness. To meet this testimony, and the inference which might be drawn from it, the judge admitted in evidence a written agreement made in 1887 by the testator with his wife. The material parts of the agreement follow:

"Witnesseth: That, whereas the said Anna L. Woodbury is seized and possessed of certain lands and real estate in her own right in the city of Washington, D. C., and Cambridge, Mass.; and whereas the said Anna L. Woodbury desires to be able to sell, dispose of and convey the same as she could were she a *femme sole;* and whereas she is unable to do so unless by and with the consent and agreement of her said husband aforesaid, Henry E. Woodbury;

"Now, therefore, it is agreed by these presents that the said Henry E. Woodbury will permit the said Anna L. Woodbury to sell, dispose of and convey any and all of her real estate as at any time she may desire to do; and in consideration of this relinquishment of all right, title, interest and claim of him, the said Henry E. Woodbury, in and to, the property and lands of the said Anna L. Woodbury, the said Anna L. Woodbury hereby covenants and agrees for herself, her heirs and assigns, to relinquish all and every right, title, interest and claim that she (or they through her) may have to any and to all of the property personal or real that the said Henry E. Woodbury possesses now or may hereafter acquire, together with her right of dower in any estate the said Henry E. Woodbury may leave in case of his demise. And she the said Anna L. Woodbury further covenants and agrees with the said Henry E. Woodbury, that under no circumstances will the said Anna L. Woodbury ask for, demand or claim from him alimony or a support for any time past, present or to come.

"In short this covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose

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of their respective properties, lands and estates—personal and real—as they possessed before they were married."

Counsel for the caveatees offered this to explain the statements of the testator, and urged its admission in connection with the fact of separation. The caveators' counsel objected to it, because it showed neither a divorce nor that the testator was a widower. The judge then said: "I think it may be competent to explain the situation here, and I will admit it." The judge further said: "Inasmuch as you have two contradictory statements from him, I think this may come in in response to that." Counsel for the caveatees, in the course of the discussion, said: "We have a right to show the relations existing between Dr. Woodbury and members of his family," but the court did not assent to this proposition and made no response to it.

We think it is clear that this agreement was admitted solely for the purpose of explaining the testator's statement about his divorce and widowerhood. If the caveators wished to limit its use, any further than it was limited by the judge in the ruling admitting it, an instruction to the jury should have been asked. We think it is competent for the purpose for which it was offered and admitted, and that its weight was for the jury. In it the wife relinquished all claims to her husband's property, real or personal, and all right to dower or of alimony, or of other support, and concluded by saying: "This covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose of their respective properties, lands and estates—personal and real—as they possessed before they were married." Though the weight of this evidence might have been slight, we think the evidence was competent.

4. The caveators, for the purpose of explaining the signature by the wife to the agreement of 1887, then offered to prove by her deposition that she had been advised by physicians, now dead, to sign any paper that the testator wished her to sign, and that it was the mania of the testator to be rid of her and

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her property, and that the testator had said to them that he would die if he could not get rid of both. This testimony was excluded, and we think rightly. The motive of the wife in signing the agreement of 1887 was entirely immaterial. She did sign it, and it was admitted solely for the purpose of explaining the testator's statement that he was a widower and had been divorced.

5. The facts upon which the next assignment of error is based are very obscure. Mena M. Stevens, the nurse, was called as a witness by the caveatees. Upon cross-examination, she testified that in 1903 and 1904 she had received from the testator gifts of certain stock and a deed to certain lands, whose rental value was $21.90 per month. The deed was delivered to a person to keep for the nurse until the testator's death. This deed was offered in evidence by the caveators. It was dated September 12, 1904. The testator described himself in this deed as a widower. Thereupon caveatees put in evidence, without objection, a deed from Henry E. Woodbury and Anna L. Woodbury, his wife, to the American Security and Trust Company, dated November 18, 1903. Whether this deed included the same land conveyed to Stevens we are unable to tell from the descriptions, but we assume it did not. The purpose for which the deed was offered does not appear. As it was admitted just prior to the admission of the agreement of 1887, and subsequent to the admission of the deed to Stevens, in which the testator called himself a widower, we may fairly assume that, like the agreement of 1887, it was offered to explain the use of the word "widower." There is nothing in the bill of exceptions to show that it was used for any other purpose, and we treat it as limited to that purpose.

The caveators offered, by the deposition of the wife, to prove the same explanation of this deed as was offered for the agreement of 1887, but the evidence was excluded. We think that the caveators have not shown that the excluded evidence was competent, and we therefore overrule this assignment of error.

It should be said generally of this and the preceding assign-

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ment of error that there is nothing to show that the instruments were received or used as evidence that the wife regarded the testator as of sound mind and capable of transacting business. There was, therefore, no occasion to offer evidence to explain the act and destroy the effect of the admission. The whole argument for the admissibility of the explanatory evidence is based upon the theory that the instruments were offered to show the wife's belief as to his mental condition—a theory which finds no support in the bill of exceptions. If the instrument had been admitted and used for that purpose a different question would be presented.

6. Turner was called as a witness in his own behalf. On cross-examination he was asked if he had made certain insulting remarks to his aunt, Sallie Woodbury. He replied that he had not. He was then shown a paper and asked if it was in his aunt's handwriting, and replied that it was, and was a letter addressed to William H. Turner. He was then asked, over the objection and under the exception of the caveators, whether the letter did not assert that the witness had made the insulting statements. The cross-examining counsel was then permitted to read the letter for the purpose of examining the witness upon the statements contained in it. This was done over objection and under exception. The letter stated that the witness had made the insulting remarks which he had denied making. The cross-examining counsel proceeded: "Now, do you mean that that statement by her is untrue?" Answer: "I do not remember making any such statement; I am not in the habit of using any such language."

It is too clear for discussion that the use permitted to be made of this letter was erroneous, and if the matter had stopped there we should be compelled to grant a new trial. The presiding judge, however, instructed the jury in behalf of the caveators, and, it would seem, at their request, as follows:

"While the caveator was allowed by the court to be cross-examined as to the statements contained in an undated letter, purporting to have been written by his aunt, Sallie Woodbury,

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addressed to William H. Turner, the jury are instructed that neither the said letter nor the use thereof so allowed by the court to be made upon the cross-examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid."

The general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 458; *Hopt* v. *Utah*, 120 U. S. 430, 438. There are cases which emphasize the necessity of clearly and unmistakably withdrawing the evidence from the consideration of the jury. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 535, 554; *Throckmorton* v. *Holt*, 180 U. S. 552, 567. But we are satisfied that this was done in this case, and that the instruction cured the error. It directed that the letter should not be taken as evidence of the truth of any of its statements or even allowed to be used for the purpose of cross-examination.

7. The remaining assignments of error relate to two instructions given to the jury and the refusal of an instruction requested by the caveators. None of the questions raised here touches upon any vital part of the case, and, while not waived, they were not much insisted upon in argument. An examination of the charge satisfies us that it contained all that the caveators were entitled to and that it was correct, full and adequate to present the issues to the jury. We will not prolong this opinion beyond what was said in the court below on this subject, which we approve.

*Judgment affirmed.*

MR. JUSTICE HARLAN did not take part in the decision of this case.

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# MAIORANO *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 103. Argued March 5, 8, 1909.—Decided April 5, 1909.

The construction of a state statute by the highest court of the State must be accepted by this court even though similar statutes of other States have been differently construed by the highest courts of those States.

A treaty between the United States and a foreign government within the constitutional limits of the treaty making power is, by the express words of the Constitution, the supreme law of the land binding alike on national and state courts and must be enforced by them in the litigation of private rights.

While undoubtedly the giving of actions for injury and death results in care and security against accidents to travelers the protection and security thus afforded are too remote to be considered as elements in contemplation of the contracting powers to the treaty of 1871 between Italy and the United States.

By a fair construction, Articles 2, 3 and 23 of the treaty with Italy of 1871, 17 Stat. 845, do not confer upon the non-resident alien relatives of a citizen of Italy a right of action for damages for his death in one of the States of this Union although such an action is afforded by a statute of that State to native resident relatives, and although the existence of such an action might indirectly promote his safety; and so *held* as to the statute of Pennsylvania, it having been so construed by the highest court of that State.

216 Pa. St. 402, affirmed.

THE facts are stated in the opinion.

*Mr. George Calvert Bradshaw* (by special leave), with whom *Mr. William Henry Seward Thomson* and *Mr. Walter V. R. Berry* were on the brief, for plaintiff in error:

The claim of plaintiff in error is based not alone upon the treaty with Italy, but upon the treaty and the Pennsylvania

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statute. The error committed in the Pennsylvania court was by wrongly interpreting the meaning of this treaty and its effect upon the Pennsylvania law. *Deni* v. *Penna. R. R.*, 181 Pa. St. 521.

The purpose and effect of fatal accidents acts is to protect human life. *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445; *Mulhall* v. *Fallon*, 176 Massachusetts, 266; *Kellyville Coal Co.* v. *Petraytis*, 195 Illinois, 217; *Cleveland, C. C. & St. L. Ry. Co.* v. *Osgood*, 73 N. E. Rep. 285, 286; *Trota* v. *Johnston*, 28 Ky. Law Rep. 853. This being so, the giving to the wife or heirs of the deceased an action to recover damages for his wrongful death is a plain, ordinary and efficacious means of protecting and securing his life from negligence. He cannot sue if killed, but his heirs can; and the value of his life can be measured by his earning power, and the defendant compelled to pay accordingly. It makes no difference to the negligent defendant who sues, or upon what theory the action is maintained. It must pay for its negligence, and the fact that the action exists is the cause compelling the defendant to exercise care and use every means possible to prevent accidents.

Under Article 3 of the treaty with Italy, all the remedies known to the law by which security and protection are afforded to the persons of Americans are, by force of this article of the treaty, intended to be granted to Italian subjects.

The action for death, while it may be a new right of action in legal theory and not a survival of the right which existed in the husband, is but a substitute for his action and is founded upon the injury done to him, and cannot be maintained except as a substitute for his right of action; nor can it be maintained unless it can be shown that there has been a wrong and injury committed against the deceased. The widow in her action brings but a substitute for the right of action which would have belonged to her husband and did belong to her husband before his decease. He may settle or prosecute his claim to judgment, and if so, she has no action. It is only where there has been no reparation made for the wrong to the husband himself, that the

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widow has any standing to maintain her action; and the Pennsylvania courts have distinctly repudiated the idea that the widow can maintain an action where the husband has released or settled his claim. *Hill* v. *Pennsylvania Railroad*, 178 Pa. St. 227; *Northern Pacific R. R. Co.* v. *Adams*, 192 U. S. 440.

The right of free access to the courts, as granted by Article 23 of this treaty, means, among other things, the right to maintain actions at law in the same way as citizens.

*Mr. Johns McCleave*, with whom *Mr. John S. Wendt* was on the brief, for defendant in error:

Fixed and received construction of the statute laws of a State by its own courts, constitute a part of such statutory law. *Green* v. *Neale*, 6 Pet. 297; *Bank* v. *Knopp*, 16 How. 391.

The Federal courts will respect state court decisions and will regard them as conclusive in all cases upon the construction of their own constitution and laws. *Brown* v. *Runnells*, 5 How. 139; *Bucher* v. *Railroad Co.*, 125 U. S. 583; *Garnley* v. *Clark*, 134 U. S. 348.

The right to recover for injury to the person resulting in death is of very recent origin and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject and differences are to be expected. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Zeiger* v. *Penna. R. R. Co.*, 151 Fed. Rep. 348; *Fulko* v. *Schuylkill Stone Co.*, 163 Fed. Rep. 124.

The treaty between the United States and the Kingdom of Italy does not amend or alter the statutes of Pennsylvania, so as to give a non-resident alien a right of action for the death of a relative under such statutes.

In Pennsylvania, no right of action has been given to Carmine Maiorano to recover damages for his own death. If one is injured and brings suit to recover for the injury in his lifetime, and subsequently dies as a result of the injury, it is true the right of action survives in the name of the administrator of

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the decedent by virtue of § 18, of the act of April 15, 1851; but where death results from the injury before any suit is brought, the right of action of the injured man dies with him, and does not survive to his administrator or other personal representative. In such case the right of action is given by the act of April 26, 1855, to the persons therein enumerated to recover the pecuniary value *to them* of the life that has been taken away. The action is not for the injury to the dead man, but it is to restore compensation for his death to those who were pecuniarily interested in the continuance of the life. It is a new and distinct right of action created by the statute, and vested in the parties named by force of the statute, and does not come to them by way of succession or inheritance from the dead man, because the dead man had no such right. *Pennsylvania R. R. Co.* v. *Zebe*, 33 Pa. St. 318, 329; *Fink* v. *Garman*, 40 Pa. St. 95; *Books* v. *Borough of Danville*, 95 Pa. St. 158, 166; *Chambers* v. *B. & O. R. R. Co.*, 207 U. S. 142. See also: *Pennsylvania R. R. Co.* v. *Henderson*, 51 Pa. St. 315, 322; *Birch* v. *Railroad Company*, 165 Pa. St. 339, 345; *McCafferty* v. *Railroad Co.*, 193 Pa. St. 339, 345.

Punishment of the wrong-doer is not the object of the act, but restoration to the widow and children of the means of support, of which the wrong-doer has deprived them, in taking away the life of their bread-winner.

Plaintiff can show, therefore, no right existing in her under the statutes of Pennsylvania, and never being a sojourner or resident in the United States, or any part thereof, she is clealy outside of the terms of the treaty between the Kingdom of Italy and the United States.

MR. JUSTICE MOODY delivered the opinion of the court.

The husband of the plaintiff in error was killed while a passenger on a train by the negligence of the defendant. The death occurred within the State of Pennsylvania, and this action was brought in a court of that State to recover damages for it.

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The plaintiff was a resident of Italy and a subject of the King of Italy. By the statutory law of the State of Pennsylvania (Act of April 15, 1851, P. L. 669, pars. 18 and 19, as amended by the Act of April 26, 1855, P. L. 309, par. 1), the right to recover damages for death occasioned by unlawful violence or negligence is in certain cases conferred upon the husband, wife, children or parents of the person killed. By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the Supreme Court of Pennsylvania, in the case of *Deni* v. *Pennsylvania R. R. Co.*, 181 Pa. St. 525, as well as in the case at bar, that this statute does not give to relatives of the deceased, who are non-resident aliens, the right of action therein provided for. There is nothing in this case to take it out of the general rule that the construction of a state statute by the highest court of the State must be accepted by this court. It is, therefore, not material that similar statutes have been differently construed, as, for instance, in *Mulhall* v. *Fallon*, 176 Massachusetts, 266, and *Kellyville Coal Co.* v. *Petraytis*, 195 Illinois, 217.

The plaintiff rests her right to recover not upon this statute alone, but upon certain provisions of a treaty between the United States and the King of Italy, ratifications of which were exchanged on November 18, 1871. 17 Stat. 845. She asserts that the effect of the treaty was to confer upon the plaintiff the same right to recover damages for the death of her husband that she would have enjoyed by the statute of the State of Pennsylvania if she had been a resident and citizen of that State. The contention of the plaintiff in this respect was denied by the trial court, which granted a judgment of nonsuit, which was affirmed by the Supreme Court of the State, and is now here on writ of error. The only question for our decision is whether a proper interpretation and effect were allowed to the treaty.

We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those

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limits, by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights. *Ware* v. *Hylton*, 3 Dall. 199; *United States* v. *Schooner Peggy*, 1 Cr. 103, 110; *Foster* v. *Neilson*, 2 Pet. 253, 314; *Hauenstein* v. *Lynham*, 100 U. S. 483; per Mr. Justice Miller, in *Head-money Cases*, 112 U. S. 580, 598, quoted with approval by Mr. Chief Justice Fuller in *In re Cooper*, 143 U. S. 472, 501; *United States* v. *Rauscher*, 119 U. S. 407, 418; *Geofroy* v. *Riggs*, 133 U. S. 258.

We put our decision upon the words of the treaty. By a fair interpretation of them, did they directly confer upon the plaintiff the right which she seeks to maintain? We are of the opinion that they did not.

Three articles only are relied on as material. They are:

Article 2.

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established."

Article 3.

"The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Article 23.

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than



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such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and, likewise, at the taking of all examinations and evidences which may be exhibited in the said trials."

Article 23 bestows upon citizens of either power, whether resident or non-resident, free access to the courts, "in order to maintain and defend their own rights," with the ancillary privileges of suitors. This article does not define substantive rights, but leaves them to be ascertained by the law governing the courts and administered and enforced in them.

Articles 2 and 3 deal with the rights of the citizens of one party sojourning in the territory of the other. There seems to be nothing pertinent to the case in Article 2. But special stress is laid upon Article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by his surviving

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relative should lie. The argument is not without force. Doubtless one reason which has induced legislators to give to surviving relatives an action for death has been the hope that care for life would be stimulated. This thought was dwelt upon in *Mulhall* v. *Fallon, supra,* in considering a statute which made the amount recoverable dependent upon the degree of culpability of the negligent person. Another reason for such legislation, quite as potent, was the desire to secure compensation to those who might be supposed to suffer directly and materially by the death. This thought seems to have been uppermost in Pennsylvania, according to the courts of that State. See *Chambers* v. *B. & O. R. R. Co.,* 207 U. S. 142, and cases cited. Without dwelling further upon the purpose and effect of legislation of this kind, and assuming that both might be calculated in some degree to increase the protection and security of persons who may be exposed to dangers, we are of opinion that the protection and security thus afforded are so indirect and remote that the contracting powers cannot fairly be thought to have had them in contemplation.

If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection, and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.

*Judgment affirmed.*

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# BOISE ARTESIAN HOT AND COLD WATER COMPANY v. BOISE CITY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 131. Argued March 17, 1909.—Decided April 5, 1909.

Equity will not interpose where there is a remedy at law which is as complete, practicable and adequate as equity could afford.

As the defense of the unconstitutionality and illegality of a tax is open in a court of law, injunction should not issue against the enforcement of the tax merely because it is unconstitutional or illegal unless other circumstances bring the case within some clear ground of equity jurisdiction.

Even though some States may for convenience of remedy permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and Federal courts should not interfere by injunction with the fiscal arrangements of a State if the rights involved can be preserved in any other manner.

A municipality speaks through its council, and where the bill does not allege any facts showing threats to remove property of a complainant public service corporation such action will not be presumed so as to give equity jurisdiction.

A suit at law by a municipality to collect a license fee imposed by ordinance on a public service corporation contemplates continuance, and not restraint, of the business of such corporation, and, as the defense of unconstitutionality of the ordinance is open in that suit, equity should not interfere.

In order to make the fear of multiplicity of suits a ground for the interposition of a court of equity, more than one suit must have been commenced, and the court should not interfere unless it is clearly necessary to protect complainant from continued and vexatious litigation.

Equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected by a suit at law in which the defense of its illegality is open, and it does not appear that the tax is a lien on any of complainant's property.

THE facts are stated in the opinion.

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*Mr. Richard H. Johnson*, with whom *Mr. Edgar Wilson* and *Mr. Richard Z. Johnson* were on the brief, for appellants:

An injunction should have been issued by the court below restraining the city from enforcing the ordinances, and from interfering with plaintiff's use, according to its franchises, of the streets and alleys. The bill made out a proper case for the interposition of a court of equity. It shows that the city maintains and insists that the water company's right to use the streets is a license only, which is subject to annulment and revocation at the will of the city, and that the city authorities have the right to compel the water company to discontinue the use of the streets and alleys, or to levy burdens and assessments for such use, at their pleasure, and that the city threatens and intends to impose further burdens and assessments on the water company for such use and to interfere with its use of the streets and alleys and has threatened to remove its pipes therefrom and its water works from the city.

The bill also alleged as additional grounds the unconstitutionality of the ordinance; the monthly presentation of bills, threats of suit, and the presentation of another bill after the suit had been commenced, showing danger of multiplicity of suits. It was also averred that the ordinances cast clouds upon the water company's franchises and depreciate the value of its property, impair its credit, embarrass its business and reduce its net revenue to an unfair and unjust extent which will amount to confiscation of its property; and, moreover, that the enforcement of those ordinances will destroy the water company's franchises and contract rights in violation of Art. I, § 10 of the Federal Constitution, and will deprive it of its property without due process of law, and deny it the equal protection of the laws.

As the ordinances which the city is seeking to enforce are in violation of the water company's contract rights and are otherwise unconstitutional, an injunction against their enforcement is the proper remedy. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82; *Vicksburg* v. *Waterworks Co.*, 202 U. S. 453;

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*Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 378–381. See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

*Mr. William E. Borah* and *Mr. Charles M. Kahn*, with whom *Mr. Charles P. McCarthy*, *Mr. Charles C. Cavanah* and *Mr. John J. Blake* were on the brief, for appellee:

The facts stated in the bill of complaint are insufficient to entitle plaintiff to any relief in, or to give jurisdiction to a court of equity.

Under the allegations of the bill the plaintiff has an adequate remedy at law.

The bill shows that plaintiff's sole object is to secure a decree of the court declaring the ordinances to be franchises for a period of fifty years; that the ordinance requiring the plaintiff to pay a license fee be declared void, for a recovery of $2,000.00, with interest, for the use of water from its system, and declaring the rates established by the water commission, relating to said use be valid.

An action at law is, at this time, pending in the state court of Idaho, by the city against the company for the recovery of $1,730.00, alleged to be due as such license fee. In that action at law, the plaintiff can present to the court all questions as to the validity of the ordinances and whether it has a franchise to use the streets for fifty years. The plaintiff could, in said action at law, either set up its claim for $2,000.00 as a counter claim in the event the court held the license fee valid, or institute an independent action in a court of law for the recovery of said amount, as the city, under the allegations of the bill, seems to be solvent.

Where the relief prayed for is such as a court of law is competent to grant, a court of equity has no jurisdiction.

Suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law. 1 Stat. 82; Rev. Stat. § 723. And see *Hipp* v. *Babin*, 19 How. 271; *Fussell* v. *Gregg*,

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113 U. S. 550; *Phœnix Mutual Life Insurance Co.* v. *Bailey*, 13 Wall. 616; *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205.

It appears from the bill in this case that the plaintiff is seeking to restrain the defendant from proceeding with an action at law in the Idaho state court, brought to recover a certain sum alleged to be due as a license fee under the ordinance of June 7, 1906. In such a case a Circuit Court of the United States will not interfere to enjoin a pending suit at law. *Hapgood* v. *Hewitt*, 119 U. S. 234; *Buzard et al.* v. *Houston*, 119 U. S. 351. See also 1 High on Injunctions (3d Ed.), §§ 89–93.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellant, a West Virginia corporation, brought in the Circuit Court of the United States for the District of Idaho, this bill in equity against Boise City, a municipal corporation. There was a demurrer to the bill, which, upon consideration of the merits of the case set forth therein, was sustained by the judge of the Circuit Court and the bill dismissed. The company appealed directly to this court. The facts set forth in the bill and exhibits, and the relief and grounds of relief claimed, so far as necessary to develop the point decided, may conveniently be stated in narrative form.

The company was incorporated for and is engaged in supplying the city and its inhabitants with water for municipal and domestic purposes. It had acquired the property, franchises, rights and privileges of certain individuals and corporations, who had been, from time to time, granted by ordinance of the city the privilege of laying and maintaining pipes in the streets and supplying through them water for municipal and domestic uses. The company conducted its business by virtue of these ordinances, and has invested large sums of money. The ordinances need not be set forth in detail, and it is enough to say that the company contends that they are franchises for a term of not less than fifty years, and constitute a contract incon-

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sistent with the license fee or tax hereafter referred to, while the city contends that they are mere permissions, revocable at any time. The rates are fixed by commissioners, acting under the authority of a law of the State, and are to remain in force three years from the date of their establishment. After the fixing of the rates and before the expiration of the three years, on the thirty-first day of May, 1906, the city enacted an ordinance requiring that the company "hereafter pay to said Boise City, on the first day of each and every month, a monthly license of $300, for the privilege granted . . . to lay and repair water pipes in the streets and alleys of said city." The ordinance then made a demand for the monthly payment of said license, and directed the city clerk to notify the company of the requirements of the ordinance.

The main object of the bill is to obtain an injunction against the enforcement of this ordinance, upon the grounds: (1) that other corporations, associations and individuals using the streets and alleys of the city for various purposes are not required to pay a license, and therefore there was, by the ordinance, a denial of the equal protection of the laws; (2) that the city, in pursuance of its claim that the ordinances grant only a revocable permission to occupy the streets, threatens and intends to impose further burdens and assessments, and threatens to remove the pipes and the works from the city; (3) that the city has presented monthly bills and has brought an action at law in the state court to recover the amount alleged to be due on account of the license fee imposed, and that there is therefore danger of a multiplicity of suits; (4) that the ordinance has cast a cloud upon the company's franchises and right to supply water to the city and its inhabitants, and thereby depreciated the value of the company's property, impaired its credit, embarrassed its business and confiscated its property; (5) that the ordinance impairs the obligation of the contract made by the ordinances granting the rights, privileges and franchises; (6) that the enforcement of the ordinance would deprive the company of its property without due process of law and abridge its privileges

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and immunities granted by the Fourteenth Amendment; (7) and that the ordinance violates the constitution and laws of the State.

A subordinate object of the bill is to recover from the city certain amounts due on account of water supplied to fire hydrants, which the city declines to pay, disputing its liability so to do.

The decree of the court below, dismissing the bill, proceeded upon a consideration of the merits of the controversy between the parties. We do not enter upon that subject, because there is a deeper question which seems to us decisive of the case. That question is whether the plaintiff is entitled, on the allegations of its bill, to relief in equity in the Federal courts.

It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law. This rule at an early date was crystallized into statute form by the sixteenth section of the Judiciary Act (Revised Statutes, § 723), which, if it has no other effect, emphasizes the rule and presses it upon the attention of courts. *New York &c. Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214. It is so well settled and has so often been acted upon that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford. *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11.

A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit

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its courts to enjoin the collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Insurance Co.* v. *Bailey*, 13 Wall. 616, 623.

In order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is *Dows* v. *Chicago*, 11 Wall. 108. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the state law, and that the property was not within the jurisdiction of the State. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

"The illegality of the tax and the threatened sale of shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on

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their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

* * * * * * * *

"No Court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a Court of equity can be invoked."

This case has been frequently followed and its governing principle never doubted. *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575, 613; *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525, 526; *Milwaukee* v. *Koeffler*, 116 U. S. 219; *Pittsburgh &c. Ry. Co.* v. *Board of Pub. Works*, 172 U. S. 32; *Arkansas Building &c. Association* v. *Madden*, 175 U. S. 269.

In the case last cited, Mr Chief Justice Fuller made the following important observation (p. 274):

It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

In *Shelton* v. *Platt*, 139 U. S. 591, a bill was filed in the Circuit Court of the United States to restrain the collection of a license tax imposed by the State of Tennessee on the United States Express Company, upon the ground that it was unconstitutional. The bill alleged that the property of the company was employed in interstate commerce and was necessary to the conduct of it, and that if it were seized by the sheriff it would greatly embarrass the company in the conduct of its interstate business, subject it to heavy damage and the public to great

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loss and inconvenience, and that the company was without adequate remedy at law. A plea alleged that the only remedy under the laws of the State was to pay the taxes under protest and bring suit to recover them back. The plaintiff had an injunction from the lower court. This court reversed the decree upon appeal, upon the ground that the remedy in equity would not lie merely because the tax was unconstitutional, unless there were allegations in the bill otherwise bringing the case within some acknowledged head of equity jurisdiction, and that the allegations of the bill were not sufficient to do this. This case was followed in *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, and in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, where a tax was alleged to be unconstitutional because imposed upon interstate commerce, because it denied to the taxpayer the equal protection of the laws, and because it was void for repugnancy to the constitution of the State.

A brief reference to some cases cited by the company, in which this court has asserted the authority of equity to interfere, will define the rule quite as well as the cases in which the court has declined to exercise the power of injunction. In *Walla Walla* v. *Walla Walla Water Co.*, *supra*, the city was about to construct, in violation of its contract, a competing water plant, and the resulting damage to the company would have been irreparable. The same conditions existed in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65. See same case, 202 U. S. 453. In *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, a schedule of rates for transportation of passengers was fixed in violation of the contract rights of the company, and possible suits would be limited only by the number of passengers. The same condition existed in *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517; and see *Ex parte Young*, 209 U. S. 123, where the grounds of the jurisdiction in equity in rate cases are fully set forth and discussed. In *Ogden City* v. *Armstrong*, 168 U. S. 224, not only was there danger of a multiplicity of suits, but the tax there in question was a lien upon realty and a cloud on the title.

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It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.

These decisions make it clear that an injunction ought not to be granted unless the bill, besides alleging illegality and unconstitutionality of the ordinance imposing the license fee, sets forth other circumstances which bring the case within some acknowledged head of equity jurisdiction. The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.

But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties.

It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatever are alleged showing such a threat. The city does not speak except by its council, and nothing has been said or done by it in this direction. On the contrary, the imposition of the license fee and the bringing of a suit for its recovery contemplate continuance and not restraint of the business of the company.

Nor do we think that there is any danger of a multiplicity

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of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pomeroy's Eq. Juris., 3d ed., § 254. Perhaps it might be necessary to await the final decision of one action at law (see for analogies *Sharon* v. *Tucker*, 144 U. S. 533; *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632), but that we need not decide.

Nor do we think that the ordinance casts a cloud upon the title of the company to its franchises. It is not a lien upon them or upon any other property of the company. The city's only remedy is that which it has employed—an action at law for the collection of the license fee. The plaintiff's real point here is, not that the ordinance imposing a license fee casts a cloud upon its title, but that the reason alleged to have induced the ordinance, namely, the city's claim that the company has no more than a mere permission to occupy the streets, unfavorably affects its property and impairs its credit. But we cannot restrain a belief or an expression of it and are not asked to. We are asked only to restrain an ordinance which in no way fixes a lien or cloud upon the plaintiff's title. It is possible that the ordinance imposing the license fee could be sustained, without passing upon the nature of the company's tenure of its privileges. On the other hand, it might be condemned without regard to that consideration.

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Here is a case where every possible defense to the collection of the license fee, which has been suggested by the company, is available to it in the action at law pending in the courts of the State of Idaho, and there is no reason whatever shown why the law should not take its course. Presumably, the company, on the ground of diversity of citizenship, might have removed the case from the state court to the Circuit Court of the United States, if the attempt had been seasonably made. If, however, the litigation continues up to the court of final resort of the State of Idaho, and all claims under the Constitution of the United States are seasonably and properly made in the state courts and are denied, then the company would be entitled to a review by this court of the judgment of the state court.

The attempt to recover the hydrant rentals is so clearly a matter for a court of law that nothing need be said of it.

The Circuit Court dismissed the bill for entirely different reasons than those which have influenced us. We neither approve nor disapprove those reasons nor intimate any opinion whatever upon the questions passed on by the Circuit Court. It would be superfluous formalism to reverse the decree of the court below and remand the case to that court, with instructions to dismiss the bill for the reasons given in this opinion, for that court has already dismissed the bill. Therefore, the decree of the court below is

*Affirmed.*

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## MACFADDEN *v.* UNITED STATES.

APPLICATION FOR WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 14 Original. Submitted April 5, 1909.—Decided April 12, 1909.

The object of the act of March 3, 1891, c. 517, 26 Stat. 826, was to distribute the appellate jurisdiction of this court between it and the Circuit Court of Appeals, and to abolish the appellate jurisdiction of the Circuit Court.

Although where a real constitutional question exists a writ of error can be sued out directly from this court to the trial court under § 5 of the act of 1891, the right to do so is lost by taking an appeal to the Circuit Court of Appeals. *Robinson* v. *Caldwell*, 165 U. S. 359.

The Circuit Court of Appeals does not lose its jurisdiction of an appeal under § 6 of the act of 1891 because questions were involved which would have warranted a direct appeal to this court under § 5 of that act.

Where the case can be taken directly to this court under § 5, or to the Circuit Court of Appeals under § 6, and the latter appeal is taken, while a writ of error will lie to the Circuit Court of Appeals if the jurisdiction of the Circuit Court rests, as shown by plaintiff's statement, on grounds, one of which is reviewable by this court, it will not lie if the only ground of jurisdiction is one where the judgment of the Circuit Court of Appeals is final.

The judgment of the Circuit Court of Appeals in a criminal case is final, and is no less so because the appellate jurisdiction of this court might have been invoked directly under § 5 of the act of 1891.

THE facts are stated in the opinion.

*Mr. Henry M. Earle* for petitioner for writ of error:

I. Whether or not a writ of error to this court may now be had for the purpose of reviewing the judgment of the Circuit Court of Appeals, is controlled by the Judiciary Act of March 3, 1891.

The interpretation of this act has been before this court in several instances; see *Robinson* v. *Caldwell*, 165 U. S. 359, in which case appellant attempted to avail himself of independ-

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ent and simultaneous appeals; See also *Carter* v. *Roberts*, 177 U. S. 496, in which appellant, after having appealed to the Circuit Court of Appeals from the Circuit Court, attempted to appeal from the Circuit Court directly to this court.

For an elaborate interpretation of the Judiciary Act see *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 408, discussing whether the judgment of the Circuit Court of Appeals was so far final, within § 6 of the act of 1891, that it could not be reviewed here as of right by writ of error and whether the judgment of that court can be reëxamined here in any way, except upon certiorari.

The *Spreckels case* arose under the revenue laws, and the case at bar arose under the criminal laws; both are within the same provision of the Judiciary Act, and consequently the conclusions of this court on the subject of its jurisdiction relative to one, are equally applicable to the other.

In the *Spreckels case*, *Robinson* v. *Caldwell*, 165 U. S. 359, was distinguished, as in the latter case appeals were taken from the Circuit Court both to the Circuit Court of Appeals and to this court.

The case before the court was one in which the jurisdiction of the Circuit Court is unquestionably established, and the case is within § 5 of the act of 1891. The judgment of the Circuit Court of Appeals is not final within the meaning of § 6 of said act, as it involves the construction of the statute relating to the use of the mails—a criminal law—and also involves "from the outset . . . the construction or application of the Constitution, or the constitutionality of an act of Congress." Under the facts and conditions stated it would appear that the decision in the *Spreckels case* (*supra*) controls the jurisdiction to review the judgment in the case at bar, a right the reason for which in this case appears in the fact that the construction of the section of the act in question, 3893, Rev. Stat., by the courts was opposed to the construction of it established by this court in the case of *Dunlop* v. *United States*, 165 U. S. 486, and *United States* v. *Swearingen*, 161 U. S. 451, and that the



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courts avoided or ignored the constitutional question; the exactness of both of these statements are obvious upon reference to the record.

II. A constitutional question does actually exist in this case. The question arising does not refer to the admitted right of Congress to regulate the mails, but to the uncertainty of some of the laws in this regard. The act in question is so framed that its administration contravenes constitutional rights. See *Ex parte Jackson*, 96 U. S. 727; *Public Clearing House* v. *Coyne*, 194 U. S. 507; *United States* v. *Comerford*, 25 Fed. Rep. 902; *United States* v. *Morris*, 14 Pet. 464; *United States* v. *Wiltberger*, 5 Wheat. 76.

The statute is uncertain, being expressed in abstract terms which depend for construction upon the ever varying personal standards of the court or jury in each particular case. Certain standards have been established by this court, but the examination of the reports show that the lower courts are so divided as to their meaning that the greatest uncertainty still exists, and no man may tell from reading the statute or from studying the varying decisions, what he may not do under it; a single instance illustrates this fact, viz.: the opinion in *Hanson* v. *United States*, 157 Fed. Rep. 749, follows *Dunlop* v. *United States*, 165 U. S. 486, and is directly opposed to *Macfadden* v. *United States*, 165 Fed. Rep. 51, 52, which is based on the case of *Rosen* v. *United States* 161 U. S. 29.

Criminal laws cannot be framed in uncertain terms. *James* v. *Bowman*, 190 U. S. 127; *United States* v. *Brewer*, 139 U. S. 288; 12 Myer, Fed. Dec. 86, § 346.

*The Solicitor General* for the United States:

This is not a case in which the constitutionality of a law of the United States is drawn in question, because this court has already declared that § 3893 is constitutional.

The mere allegation that an act is unconstitutional is not sufficient to draw in question the constitutionality of the act. The constitutional or other Federal claim must be real and sub-

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stantial in order to give jurisdiction to this court; the bare averment of a Federal question is not sufficient; there must be at least color of ground therefor. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Fort Smith Ry.* v. *Merriam*, 156 U. S. 483; *Clarke* v. *McDade*, 165 U. S. 172; *Wilson* v. *North Carolina*, 169 U. S. 595; *Lampasas* v. *Bell*, 180 U. S. 276; *Sawyer* v. *Piper*, 189 U. S. 154; *American R. R. Co.* v. *Castro*, 204 U. S. 453.

The mere allegation of the petitioner that it is unconstitutional cannot make a case in which the constitutionality of a law of the United States is drawn in question within the meaning of § 5 of the judiciary act of March 3, 1891. In a number of previous cases arising under § 3893, the points raised in this case by the petitioner were passed upon by this court and decided in favor of the constitutionality of the act. *Ex parte Jackson*, 96 U. S. 727, 736; *Rosen* v. *United States*, 161 U. S. 29, 42; *Dunlop* v. *United States*, 165 U. S. 486; *United States* v. *Chase*, 135 U. S. 255, 261.

This court has also considered convictions obtained under the act, without indicating any doubt as to its constitutionality. *Grimm* v. *United States*, 156 U. S. 604; *Swearingen* v. *United States*, 161 U. S. 446; *Andrews* v. *United States*, 162 U. S. 420; *Price* v. *United States*, 165 U. S. 311.

When this court decides a question of law, it makes the law, and thereafter there cannot be said to be any question of law in regard to that proposition which it has already decided. *Kansas* v. *Bradley*, 26 Fed. Rep. 289; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561; *Lampasas* v. *Bell*, 180 U. S. 276; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, discussed and distinguished from the present case.

MR. JUSTICE MOODY delivered the opinion of the court.

The petitioner, Bernarr Macfadden, was indicted in the Dis-

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trict Court of the United States for the District of New Jersey for mailing obscene literature, in violation of § 3893 of the Revised Statutes. He pleaded not guilty, and upon trial before a jury was found guilty.

Various questions of law arose in the course of the trial, which need not be stated.

After the evidence was concluded the petitioner presented to the presiding judge many requests for instructions to the jury, which were refused, under exception. For the purposes of this case four only need to be referred to, and they summarily. The judge was requested to rule that the statute under which the indictment was returned was unconstitutional; (*a*) because it abridged the freedom of the press; (*b*) because it was uncertain and created no general rule of conduct, and therefore the indictment was without due process of law; (*c*) because it was an *ex post facto* law; (*d*) because it delegated legislative power to the court or jury.

There was a motion in arrest of judgment, which was overruled. Thereupon judgment was entered, and the petitioner sued out a writ of error to the Circuit Court of Appeals for the Third Circuit. That court affirmed the judgment.

After a denial of a petition for a writ of certiorari the petitioner made application to one of the justices of this court for a writ of error, directed to the Circuit Court of Appeals. The question of the right of the petitioner to such a writ of error has been referred to the full court, and, by direction of the court, briefs on the part of the United States and the petitioner have been filed and considered.

The object of the act of March 3, 1891, c. 517, 26 Stat. 826, was to distribute the appellate jurisdiction of the Supreme Court between it and the newly-created Circuit Courts of Appeal, and to abolish the appellate jurisdiction of the Circuit Courts. The first necessary step in this undertaking was to determine in what cases appeals (using the word in its broader sense) might be taken directly to this court. This was done in § 5, which is as follows:

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"SEC. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

Clause 3 of this section has been amended by the act of January 30, 1897, c. 69, 29 Stat. 492 by striking out the words "or otherwise infamous."

Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a writ of error might have been sued out originally directly from this court under clause 5. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472. But this was not done, and by the appeal to the Circuit Court of Appeals the right of direct appeal here was lost. *Robinson* v. *Caldwell*, 165 U. S. 359.

Section 6 of the act provides that the Circuit Courts of Appeal shall exercise appellate jurisdiction "in all cases other than those provided for in the preceding section of this act," and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the Circuit Court of Appeals of its jurisdiction. *American Sugar Co.* v. *New Orleans*, 181 U. S. 277. In the case at bar the Circuit Court of Appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to

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that judgment? The answer to this question depends upon whether the judgment of the Circuit Court of Appeals was final. The act contemplated that certain judgments of the Circuit Court of Appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in § 6 of the act. It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by § 5 of the act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the Circuit Court or the District Court; whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, where it was said by the Chief Justice, citing cases, "The jurisdiction referred to is the jurisdiction of the Circuit Court as originally invoked." The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the Circuit Court of Appeals to this court, is important, and a neglect to observe it leads to confusion.

The statute says that the judgment of the Circuit Court of Appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars.

As this is a case arising under the criminal laws, the judgment of the Circuit Court of Appeals rendered within its lawful juris-

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diction is, by the very terms of the act, final. And so it was held in *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.*, 187 U. S. 427, this court saying, through the Chief Justice: "Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under § 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the Circuit Court of Appeals, he must abide by the judgment of that court," and the writ of error to the Circuit Court of Appeals was accordingly dismissed. Unless this case has been overruled, it governs the case at bar.

But it is argued that the right to this writ of error is supported by the decision of this court in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397. An examination of that case, however, shows that the exact decision has no relevancy to the question now before us. The language of the opinion should be interpreted in the light of the facts of the case. The plaintiff there brought an action against the collector of internal revenue to recover certain taxes imposed by the revenue laws of the United States, paid by it under protest. The plaintiff's claim as stated in his declaration was twofold; first, that the taxes were not due under the act as properly construed; and, second, that the act itself was unconstitutional. The jurisdiction, therefore, of the trial court was invoked upon two grounds; first, because it was a revenue case; and, second, because it arose under the Constitution and laws of the United States (25 Stat. 433), which means that the plaintiff's case thus arose. *Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U. S. 149, and cases cited. Judgment went against the plaintiff, and it was affirmed by the Circuit Court of Appeals. A writ of error from this court to the Circuit Court of Appeals was sued out, and the question was whether it would lie. That question, as we have seen it, is determinable by the jurisdiction of the trial court. If the jurisdiction depended solely upon the fact that it was a case arising

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under the revenue laws the judgment of the Circuit Court of Appeals was a final judgment. If, on the other hand, the jurisdiction depended solely upon the fact that it was a case arising out of the Constitution or laws of the United States, the jurisdiction of the Circuit Court of Appeals was not final, and it was reviewable upon the writ of error as matter of right in this court.

Here was a case, then, which in one aspect of the jurisdiction was reviewable by this court and in another aspect of the jurisdiction was not reviewable here. The precise case had not arisen before, and the statute was silent upon it. It was held that the writ of error could be maintained, as the jurisdiction of the trial court did not depend solely upon grounds which by the terms of the act would have made the judgment of the Circuit Court of Appeals final, but depended also upon grounds which would have permitted a writ of error from this court to the Circuit Court of Appeals. That this was the precise ground of the decision is clear from the whole trend of the reasoning and from the statement in the opinion, p. 410, that "the judgment of the Circuit Court of Appeals is not final, within the meaning of the sixth section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the Constitution or the constitutionality of an act of Congress." The case decides nothing more than that where the jurisdiction of the trial court is shown by the plaintiff's statement of his own case to rest upon two distinct grounds; first, a ground where the appellate jurisdiction of the Circuit Court of Appeals was made final by the statute; and, second, a ground where the appellate jurisdiction of the Circuit Court of Appeals was made by the statute reviewable in this court, the latter ground of jurisdiction would control and the writ of error to the Circuit Court of Appeals would lie. Thus construed, the case is consistent with all the decisions and has no application here, because the only ground of jurisdiction of the District Court in the case

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at bar was that it was a case arising under the criminal laws. In such a case the statute makes the judgment of the Circuit Court of Appeals final, and it is no less final because the petitioner here might, if he had been so advised, originally have invoked directly, under § 5 of the act, the appellate jurisdiction of this court.

We are of the opinion that the writ of error does not lie, and the application for it is

*Denied.*

## UNITED STATES v. EVANS.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 394. Submitted December 18, 1908.—Decided April 19, 1909.

Under § 935 of the Code of the District of Columbia, act of March 3, 1901, c. 854, 31 Stat. 1341, a writ of error will not lie from the Court of Appeals to the Supreme Court of the District at the instance of the Government to review a judgment based on a verdict of not guilty.

When the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal for the purpose of establishing a rule of observance in cases subsequently arising is not an exercise of judicial power.

Writ of certiorari to review 30 App. D. C. 58, quashed.

THE facts are stated in the opinion.

*The Solicitor General* for petitioner:

Congress clearly intended to give the United States a right of appeal in criminal cases, after verdict. The statute seems to be free from doubt or ambiguity. 31 Stat. 1189, 1341 (§ 935, Code D. C.).

The policy or wisdom of a statute is for the determination of the legislature, not of the courts.

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The allowance of an appeal for the purpose of settling questions of law, practice and procedure for the guidance of trial courts in future cases is not new in the legislation of this country. *State* v. *Granville*, 45 Ohio St. 264, 278; *State* v. *Buechler*, 57 Ohio St. 95; *State v. Ruedy*, 57 Ohio St. 224; *State* v. *Van Valkenburg*, 60 Indiana, 302; *Commonwealth* v. *Bruce*, 79 Kentucky, 560; *Commonwealth* v. *Van Tuil*, 1 Metcalf (Ky.), 1; *State* v. *Ward*, 75 Iowa, 637.

Congress undoubtedly had the power to enact § 935 of the District of Columbia Code. *United States* v. *Sanges*, 144 U. S. 310; *United States* v. *Macdonald*, 207 U. S. 120; *State* v. *Lee*, 65 Connecticut, 265.

This proceeding is a "case" or "controversy" within the meaning of the third article of the Constitution of the United States, by which the judicial power of the United States is extended only to "cases" and "controversies." 2 Story on Const., § 1646; *Osborn* v. *Bank*, 9 Wheat. 738, 819; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447; *Smith* v. *Adams*, 130 U. S. 167; *Fisk* v. *Henarie*, 32 Fed. Rep. 417, 423; *Home Ins. Co.* v. *North Western Packet Co.*, 32 Iowa, 223, 238.

But whether this is or not a case or controversy within the meaning of the third article of the Constitution, it is unnecessary to inquire, because the courts of the District of Columbia are not of the class referred to in that article, and Congress in conferring jurisdiction upon them is not limited, as it is by the third article of the Constitution with respect to the inferior Federal courts, to "cases" and "controversies."

The courts of the District of Columbia are created by Congress by virtue of its authority "to exercise exclusive legislation in all cases whatsoever over such district." Const., Art. I, § 8, clause 17. In this respect the courts of the District are to be classed with the territorial courts. This is the view clearly intimated in *McAllister* v. *United States*, 141 U. S. 174, 184.

No counsel appeared for respondents.

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MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Appellees were tried under an indictment for murder in the Supreme Court of the District of Columbia on February 1, 1907, and found not guilty. The United States appealed to the Court of Appeals of the District, and assigned error on exceptions taken during the trial to the exclusion of certain evidence. This right to appeal was claimed under § 935 of the code, which reads as follows:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions; provided, that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

The appeal was dismissed for want of jurisdiction, and the case brought here on certiorari.

The case of *United States* v. *Sanges*, 144 U. S. 310, reiterated the then well-settled rule that the right of review in criminal cases was limited to review at the instance of the defendant after a decision in favor of the Government. *United States* v. *Dickinson*, *ante*, p. 92.

In *United States* v. *Evans*, 28 App. D. C. 264, under § 935 of the code, the right was exercised without question in a case where an indictment had been set aside on demurrer, and Chief Justice Shepard, in delivering the opinion of the court in this case (30 App. D. C. 58), said:

"It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy."

But the Chief Justice further said that it was contended by appellants that a writ of error lies also "upon a judgment where there has been a verdict of not guilty, not, however, to obtain

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a reversal of that judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise."

But this contention was rejected by the court in view of the objectionable consequences that would result from such an exercise of jurisdiction. "The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

It was in the light of these considerations that the act of Congress of March 2, 1907, 34 Stat. 1246, c. 2564, was subjected to the limitations therein contained. *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Mason*, *ante*, p. 115.

By the constitutions of several of the States the justices of the highest judicial tribunals are obliged to give their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or the governor or governor and council, and there are many interesting discussions in the state reports, as well as in articles by the law writers, in respect of such a provision.[1]

But no such requirement obtains in Federal jurisprudence.

Such a provision was suggested in the Federal Constitutional Convention, but disappeared in the Committee on Detail.

[1] Thayer on Advisory Opinions, Legal Essays, 43; Dubuque, The Duty of Judges as Constitutional Advisors, 24 Amer. Law Review, 369; Emery, C. J., 2 Maine Law Review, 1; Cases collected in 6 Amer. & Eng. Cycl. (2d. ed.) 1065. And see 103 Maine, 306, and especially opinion of Savage, J.

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In 1793 President Washington sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France, but they declined to respond. Marshall thus speaks of the matter in his Life of Washington:

"About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." Story on the Constitution, § 1571.

It was long ago held by this court that the discharge of such a function was not an exercise of judicial power. *United States* v. *Ferreira*, 13 How. 40, note on page 52; *Hayburn's Case*, 2 Dall. 409; see note, pp. 410, 411, 412, 413, 414. And that ruling sustains the conclusion of the Court of Appeals, in the matter of the construction of this act to which the opinion is confined.

*Writ of certiorari quashed.*

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## LEEDS AND CATLIN COMPANY *v.* VICTOR TALKING MACHINE COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 80. Argued January 15, 18, 1909.—Decided April 19, 1909.

Where grave questions of fact are presented by the proof on which a preliminary injunction has been granted in a patent case, this court will not go beyond the action of the lower court and decide those questions and the case on the merits.

A combination which produces by the coöperation of its constituents the result specified in the manner specified is a true mechanical device and a valid combination.

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A patent may embrace more than one invention, *Steinmetz* v. *Allen*, 192 U. S. 543, and it may embrace a process and the apparatus by which it is performed.

Where dependent and related inventions are patented separately a foreign patent for either does not affect the other under § 4887, Rev. Stat., and the same rule applies if such inventions are embraced in one patent.

While a combination is a union of elements which may be partly new, or wholly old or wholly new, the combination is a means distinct from its constituent elements, any of which, if new and patentable, may be covered by separate claims in the same patent as the combination.

Separate claims in the same patent are independent inventions, and the infringement of one is not the infringement of the others, and the redress of the patentee is limited by the injury he suffers; nor is the validity and duration of valid claims affected by the invalidity or expiration of any other claim. *Siemens* v. *Sellers*, 123 U. S. 276, distinguished.

In this case *held* that the foreign patent granted to Berliner for talking machines was not identical with certain claims included in his United States patent in suit and therefore his patent as to those claims did not expire with the foreign patent under § 4887, Rev. Stat.

A patent of the United States for an invention extends under § 4887, Rev. Stat., for the duration of the definite term for which a foreign patent may have been granted for the same invention, and does not expire by the forfeiture of such foreign patent or through the operation of a condition subsequent according to the foreign patent, such as the payment of fees during the life of the patent.

146 Fed. Rep. 534; 148 Fed. Rep. 1022, affirmed.

THIS case is here on certiorari to an interlocutory decree of injunction restraining the petitioner, Leeds & Catlin Company from manufacturing, using or selling sound reproducing apparatus or devices embodied in claim No. 35 of letters patent No. 534,543, issued to Emil Berliner, bearing date nineteenth of February, 1895, and also from manufacturing, using or selling or in any way disposing of apparatus or devices which embody the method specified in claim No. 5 of the same patent. These claims will be given hereafter.

The bill is in the usual form and alleges the issuing of the patent and the existence of the necessary conditions thereof

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under the laws of the United States. It also alleges the transfer of title to the plaintiffs in the suit and the infringement of claims 5, 32 and 35 by the defendant, petitioner herein.

Petitioner answered, denying some of the allegations of the bill, and of others denying that it had knowledge or information sufficient to form a belief. Explicitly denied infringement, and alleged anticipation of the invention described in the patent by a great number of patents and publications in this country and other countries, an enumeration of which was made. And hence it is alleged that, in view of the state of the art, Berliner was not the first inventor or discoverer of any material or substantial part of the alleged improvement and invention described or claimed.

The answer further alleged that said letters patent did not describe or specify or claim any subject-matter patentable under the statutes of the United States, and are and always have been null and void. Abandonment is alleged and a two-years' use of the invention in this country before the application for the patent, that the invention and improvement were known and used by others and were in public use and on sale in this country by divers persons, a list of whose names is given.

It is alleged that before the invention was patented in the United States the same was patented, or caused to be patented, by Emil Berliner in foreign countries, and that by reason whereof, under § 4887 of the Revised Statutes of the United States, the letters patent in suit were limited to expire at the same time with said foreign patents and each of them. The numbers and dates of the foreign patents are given—two in Great Britain, three in France, three in Germany and one in Canada. They will be specifically referred to hereafter. And it is alleged that in consequence thereof the said letters patent of the United States have long since expired and plaintiff is not entitled to any relief by injunction or other relief in equity, that a court of equity has no jurisdiction of the suit, and that plaintiff has an adequate remedy at law. A replication was filed to the answer.

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Upon the bill and certain supporting affidavits an order to show cause against a preliminary injunction was issued, which coming on to be heard upon such affidavits, and other affidavits and exhibits, a preliminary injunction was granted. 146 Fed. Rep. 534. It was affirmed by the Circuit Court of Appeals. 148 Fed. Rep. 1022.

*Mr. Louis Hicks* for petitioner:

Claims 5 and 35 of the patent in suit are void because they are claims for the functions of a machine. See dissenting opinion of Wallace, J., case below, 154 Fed. Rep. 61; *Westinghouse* v. *Boyden Co.*, 170 U. S. 537, 554; *Corning* v. *Burden*, 15 How. 252; *The Telephone Cases*, 126 U. S. 1, 531; *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, 78; *Hatch* v. *Moffitt*, 15 Fed. Rep. 252; *Cleveland Co.* v. *Detroit Co.*, 131 Fed. Rep. 740, 742; *Gage* v. *Kellogg*, 23 Fed. Rep. 891, 894; *Manhattan Co.* v. *Helios Co.*, 135 Fed. Rep. 785; *Tyden* v. *Ohio Co.*, 152 Fed. Rep. 183; *American Co.* v. *Steward*, 155 Fed. Rep. 731, 738; *American Co.* v. *Denning*, 160 Fed. Rep. 108.

Claims which describe the operation and effect of a machine have, without exception, been held invalid. *Busch* v. *Jones*, 184 U. S. 598, 607; *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, citing and approving *Mackay* v. *Jackman*, 12 Fed. Rep. 615; *Brainard* v. *Cramme*, 12 Fed. Rep. 621; *Gage* v. *Kellogg*, 23 Fed. Rep. 891; *Hatch* v. *Moffitt*, 15 Fed. Rep. 252; *Sickles* v. *Falls Co.*, 4 Blatch. 508; *Excelsior Co.* v. *Union Co.*, 32 Fed. Rep. 221; *Coupe* v. *Weatherhead*, 16 Fed. Rep. 673; aff'd 147 U. S. 322; *Stokes Co.* v. *Heller*, 96 Fed. Rep. 104; *Dodge Mfg. Co.* v. *Ohio Works*, 101 Fed. Rep. 584; *Dodge Mfg. Co.* v. *Collins*, 106 Fed. Rep. 935, 937; *Cleveland Co.* v. *Detroit Co.*, 131 Fed. Rep. 740, 742; *Travers* v. *Hammock Co.*, 78 Fed. Rep. 638; *Wells Glass Co.* v. *Henderson*, 67 Fed. Rep. 930, 935; *American Co.* v. *Elkhart Co.*, 84 Fed. Rep. 960; *Ginsdorff* v. *Deering*, 81 Fed. Rep. 952; *Dick Co.* v. *Henry*, 160 Fed. Rep. 690, 692.

Claim 35 of the patent in suit is void because it is indefinite

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and meaningless and claims nothing. See *Merrill* v. *Yeomans*, 94 U. S. 568, 573; *Keystone Bridge Co.* v. *Phœnix Iron Co.*, 95 U. S. 274, 278; *Hardison* v. *Brinkman*, 156 Fed. Rep. 962, 967; *Cincinnati Co.* v. *American Co.*, 143 Fed. Rep. 322, 325.

Claims 5 and 35 of the patent in suit are void because anticipated by British patent No. 1644 of 1878 to Edison, and for lack of invention in view of the prior art. This defense is good and valid and should have been considered and decided on its merits by the courts below under the rule stated by this court in *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485. See under this head: *McClain* v. *Ortmayer*, 141 U. S. 419, affirming 33 Fed. Rep. 284.

Claims 5 and 35 of the patent in suit are void because anticipated by United States patent No. 341,214 of May 4, 1886, to Bell and Tainter, or by British patent No. 6027 of May 4, 1886, to Johnson for the same Bell and Tainter invention, and for lack of invention in view of the prior art.

Claims 5 and 35 of the patent in suit are void because anticipated by Werner Suess, and for lack of invention in view of the prior art.

This defense rests upon the three following documents:

1. United States patent No. 427,279, of May 6, 1890, to Suess, assignor to Berliner.

2. Canadian patent No. 41,901 of February 11, 1893, applied for May 5, 1891, to Berliner, as assignee of Suess.

3. Berliner's lecture before the Franklin Institute of May 16, 1888, acknowledging Suess to be the inventor.

Berliner patent in suit No. 534,543, of February 19, 1895, was granted for an invention previously patented by Berliner in Germany, by Berliner German patent No. 53,622, of November 20, 1889. The term of the patent in suit, therefore, expired with the expiration of the term of the prior German patent on November 7, 1902, before this suit was begun. Revised Statutes, § 4887; *Bate Refrig. Co.* v. *Sulzberger*, 157 U. S. 1; *Société* v. *Electric Co.*, 97 Fed. Rep. 604, 605; *Siemens' Admr.* v. *Sellers*, 123 U. S. 276.



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Revised Statutes, § 4887, fixing the single term of a home "patent granted for an invention" previously patented in a foreign country, is clear and unambiguous and must control the decision in this suit without change by judicial action "based upon some supposed policy of Congress." A patent cannot have a plurality of terms and expire in parcels. *Siemens* v. *Sellers*, 123 U. S. 276. And see also *Hadden* v. *Collector*, 5 Wall. 107, 111; *Scott* v. *Reid*, 10 Pet. 524, 527; *Karst* v. *Gane*, 136 N. Y. 316, 321; *People* v. *Woodruff*, 132 N. Y. 355, 364; *South Bay Co.* v. *Howey*, 190 N. Y. 240, 247.

Broadening or narrowing the claims of an American patent will not prevent the operation of the statute. 5 Federal Statutes Annotated, 470, and cases there cited.

The test of the question whether an American patent is granted for an invention previously patented in a foreign country, is whether an article made according to the description of the invention patented by the foreign patent would infringe the American patent, that is, any claim of the American patent. *Commercial Manufacturing Co.* v. *Fairbank Co.*, 135 U. S. 176.

In determining whether a home patent is granted for an invention previously patented in a foreign country, the precise question is whether any of the claims of the home patent include the invention or some substantive part of the invention shown by the prior foreign patent. If so, the home patent expires as to all its claims with the foreign patent since a "patent cannot expire in parcels." *Western Electric Co.* v. *Citizen's Tel. Co.*, 106 Fed. Rep. 215; *Thomson-Houston Co.* v. *McLean*, 153 Fed. Rep. 883. See *Electrical Accumulator Co.* v. *Brush Electric Co.*, 52 Fed. Rep. 130.

A patent cannot expire in part and survive in part. A generic claim, covering the specific form of a specific claim and other forms as well, must, under any construction of the statute, expire with the expiration of the specific claim. *Sawyer Spindle Co.* v. *Carpenter*, 133 Fed. Rep. 238; aff'd 143 Fed. Rep. 976; *Aquarama Co.* v. *Old Mill Co.*, 124 Fed. Rep. 229, and *Westinghouse Co.* v. *Stanley Co.*, 138 Fed. Rep. 123, distinguished.

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Berliner patent in suit No. 534,543 of February 19, 1895, was granted for inventions previously patented by Berliner in France, by his French patent No. 207,090 of July 19, 1890. The term of the patent in suit, therefore, expired with the expiration of the term of the prior French patent on July 19, 1905, before the decree for injunction was entered.

The patent in suit and claims 5 and 35 thereof expired, before this suit was begun, with the expiration of the prior British, French and German patents of November 8, 1887, to Berliner for the so-called "Basic Invention" covered by said claims 5 and 35.

Berliner patent in suit No. 534,543 of February 19, 1895, expired February 11, 1899, before this suit was begun, with the expiration of the term of six years for which the prior Berliner-Suess Canadian patent No. 41,901, of February 11, 1893, was granted, and beyond which it was not prolonged. *Commercial Mfg. Co.* v. *Fairbank*, 135 U. S. 176. See also: *Bate* v. *Hammond*, 129 U. S. 151; *Gramme Electric Co.* v. *Arnoux*, 17 Fed. Rep. 838, 840.

Judge Townsend found that the Berliner-Suess Canadian patent "discloses and broadly claims the invention covered by the claims here in suit," and "that if this patent expired, as claimed in 1899, the patent in suit expired at the same time."

Assuming, as Judge Townsend found, that the Berliner-Suess Canadian patent "discloses and broadly claims the invention covered by the claims here in suit," the patent in suit expired on February 11, 1899, with the expiration of the six year term for which the Canadian patent was granted.

The invention of the Berliner-Suess Canadian patent was, under the statute and decided cases, patented and caused to be patented by Berliner, the patentee of the patent in suit.

Under the patent act of Canada, a Canadian patent "expires," within the meaning of § 4887 of the Revised Statutes, at the expiration of the term for which the fee to the Government has been paid, unless a further fee for a "further term" is paid.

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The patent does not lapse and is not forfeited, but its term expires. The Berliner-Suess Canadian patent was granted for a term of six, and not of eighteen, years, since the granted term depends solely upon the provisions of the patent act.

Under the provisions of the patent act of Canada payment of a further fee for the prolongation of the patent for a further term is a condition precedent to the existence of a term beyond the original term of six years, and not a condition subsequent operating on non-performance to forfeit the unexpired portion of a term previously granted. See *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 381, 386; *Davis* v. *Gray*, 16 Wall. 229; *Giddings* v. *Ins. Co.*, 102 U. S. 111.

*Mr. Horace Pettit* for respondents:

The validity of claims 5 and 35 have been sustained in all cases where these claims have been brought into question. *Victor Talking Machine Co.* v. *American Graphophone Co.*, 140 Fed. Rep. 860; same case on appeal, 145 Fed. Rep. 350; *Victor Talking Machine Co.* v. *Hoschke et al.*, 158 Fed. Rep. 309; *Victor Talking Machine Co.* v. *The Fair*, 118 Fed. Rep. 609; *S. C.*, 123 Fed. Rep. 424; also *Victor Talking Machine Co.* v. *Shaffer & Salm*, and *Victor Talking Machine Co.* v. *Douglas Phonograph Co.*, not yet reported.

*Siemens* v. *Sellers*, 123 U. S. 276, does not sustain petitioner's proposition that if a minor feature of the United States patent happens to be patented abroad before the United States patent separately and independently of the main feature of the United States patent, that the expiration of that patent forfeits the entire United States patent. Such a proposition is absolutely contrary to the intent of § 4887. See *Westinghouse* v. *Stanley Improvement Co.*, 138 Fed. Rep. 623. Under the decision in *Siemens* v. *Sellers*, the foreign patent, in order to come within the statute, § 4887, must contain the principal invention of the United States patent sought to be curtailed thereby. See also *United Nickle Co.* v. *California Electrical Works*, 25 Fed. Rep. 475, 479; *Gage* v. *Herring*, 107 U. S. 640, 646; *Leggett* v. *Standard*

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*Oil Co.*, 149 U. S. 287, 293; *Carlton* v. *Bokee*, 17 Wall. 463, 472; *Russell* v. *Place*, 94 U. S. 606, 609; *Celluloid Mfg. Co.* v. *Zylonite Brush & Comb Co.*, 27 Fed. Rep. 291, 294.

In all the authorities, however, which have been considered where it was held that the prior foreign patent limited the domestic patent, the substantial invention of the United States patent had been patented in the prior foreign patent, or the invention of the foreign patent has been so nearly like the substantial invention of the United States patent as to render them practically one and the same.

Where they have not been substantially one and the same, the defense has failed. *Aquarama Co.* v. *Old Mill Co.*, 124 Fed. Rep. 333; *Welsbach Light Co.* v. *Rex Incandescent Co.*, 94 Fed. Rep. 1006; *Electric Accumulator Co.* v. *Brush Electric Co.*, 52 Fed. Rep. 130. See also *Westinghouse Electric Co.* v. *Stanley Instrument Co.*, 138 Fed. Rep. 823.

Is the principal invention of the domestic patent found in the foreign patent? Is the subject-matter of one the same in all essential particulars as that of the other? These were the main tests applied in *Siemens* v. *Sellers*, 123 U. S. 276. See also *Accumulator Co.* v. *Julien Electric Co.*, 57 Fed. Rep. 605.

If the principal invention of the subsequent United States patent is not described or claimed in the prior foreign patent, the principal invention cannot forfeit. *Westinghouse Electric Co.* v. *Stanley Instrument Co.*, 138 Fed. Rep. 823.

In construing § 4887 the period of the prior foreign patent to be taken into consideration with the domestic patent, is the longest possible term of the foreign patent; is the period of duration expressed in the grant; or in other words, the duration of the United States patent is fixed when the United States patent issues, by the longest possible term of the foreign patent, and shall not be subject to be terminated by the occurrence or non-occurrence of certain facts which would require extraneous proof. *Diamond Match Co.* v. *Adirondack Match Co.*, 65 Fed. Rep. 803; *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 381; *Holmes Electric Protective Co.* v. *Metropolitan Burglar Alarm*

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*Co.*, 21 Fed. Rep. 458; *Consolidated Roller Mill Co.* v. *Walker*, 43 Fed. Rep. 575.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

The motion for preliminary injunction was made upon affidavits. Those of respondent (complainant in the Circuit Court) described the invention and the machine made in accordance therewith, averred the practical identity of petitioner's machine therewith, and set forth the record in the case of *The Victor Machine Co. and The United States Gramophone Co.* v. *The American Graphophone Co.*, instituted in the Circuit Court for the Southern District of New York. The affidavits averred that the suit was pending and awaiting decision when this suit was brought, and was subsequently decided; that by the decision, claims 5 and 35 of the patent in suit were held valid and infringed by the talking machine of the defendants, and that an injunction was ordered. 140 Fed. Rep. 800. And it was stated that the Circuit Court of Appeals, though not concurring with the Circuit Court in all of its reasoning, affirmed the decree.

The affidavits of petitioner (the defendant in the courts below) set forth the defenses which were made in the case just referred to, a summary of the proofs introduced to sustain the defense, and submitted new matter. The affidavits also contained a description of the patent in suit and what was considered to be its basic invention, averred its identity with certain foreign patents which were not in evidence in the other suit. The affidavits also undertook to meet and refute the charge of infringement. The affidavits were very long and circumstantial, and had attached to them copies of the foreign and domestic patents relied on, translations of foreign laws, copies of publications and certain testimony. Such parts of these exhibits as we deem relevant will be referred to hereafter.

Upon this body of proof, formidable even in its quantity, and having no other elucidation than the arguments of counsel and

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some mechanical exhibits, presenting grave questions of fact, we are asked by petitioner to go beyond the action of the lower courts, and not only reverse them as to a preliminary injunction but decide the case. If we should yield to this invocation and attempt a final decision it would be difficult to say whether it would be more unjust to petitioner or to respondent.

The Circuit Court felt a like embarrassment, as will be observed from its opinion. The court did not pass on the defense of infringement, and said that, except as to one patent, the petitioner had failed to introduce any new matter which would have led the courts in the other case, if such matter had been before them, to have reached a different conclusion. And, speaking of the patents referred to, the Circuit Judge said: "But even if I am mistaken in this view, and if the expiration of the Suess Canadian patent is a complete defense, or if a decision of the questions raised as to the character and scope of the various patents now introduced for the first time should be postponed until final hearing, yet I am constrained to grant the injunction in order to permit an appeal and a determination of the questions at the earliest possible moment."

And the lower courts also reserved to the merits the consideration of the defense that claims 5 and 35 were invalid because they were the functions of machines, resting those defenses, so far as the preliminary injunction was concerned, upon the adjudication in the prior suit. We shall do the same, remarking, however, that the contention, if it has any strength as to claim 5, seems to us untenable as to claim 35. We think the latter is a valid combination, consisting of the elements, (1) a traveling tablet having a sound record formed thereon; (2) a reproducing stylus, shaped for engagement with the record, and free to be vibrated and propelled by it. It is, therefore, a true mechanical device, producing by the coöperation of its constituents the result specified and in the manner specified.

In passing on the other foreign patents the Circuit Court considered that the prior adjudications fortified the presumption of the validity of the patent in suit, and established its scope,

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and that the new matter introduced by petitioner did not repel the presumption or limit the extent of the patent. That the lower courts properly regarded the prior adjudications as a ground of preliminary injunction is established by the cases cited in Walker on Patents, § 665 *et seq.* See also Robinson on Patents, § 117 *et seq.* And in that aspect the question must be considered, and so considering it we may pass the defenses of anticipation, whether complete or partial, and the defense of infringement. These are, we have already said, questions of fact which we are not inclined to pass upon unaided by the judgments of the lower courts made after a hearing on the merits.

The patent in suit and the patents which, it is contended, anticipate it or limit its extent or duration are for methods or devices whereby sound undulations trace or inscribe themselves upon a solid material, and are by suitable devices made to reproduce themselves and the sounds which made them. One of the questions in the case is, as we have seen, the relation of the patent in suit to the prior art. It is contended by the respondent that Berliner (he was the patentee of the patent in suit), improved the prior art, not only in the methods of recording and reproducing sounds, but in the devices by which the methods are accomplished.

In the old method the sound record was produced by vertical vibrations, either indenting a pliable material, by and in accordance with the sound waves along a helical or spiral line, as in the Edison patents, or by like vibrations engraving a suitable material, by and in accordance with the sound waves, as in the Bell and Tainter patent. By both of these methods there was produced a record consisting of a groove of varying depth, that is, containing elevations and depressions corresponding to the sound waves which produced them. In the Berliner patents the vibrations are made to inscribe a laterally undulating line in the general direction of a spiral. The line, therefore, is of even depth, the inequalities or sinuosities produced by the sound waves being upon its sides. By this method there is pro-

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duced a sound record tablet, consisting of a flat disc of hard resisting material, having in its surface inscribed a spiral groove of practically even depth, but undulating laterally in accordance with the sound waves. The patent in suit describes and specifies the ways of making such record tablet, as do the prior patents the sound records of the respective patentees. Further description of the records, however, is not necessary, as we shall have with them but incidental concern.

The records being made, the next step is the reproduction of the sounds which they record. This is done by adjusting to the line or groove inscribed upon the records a point or stylus attached to a diaphragm, which, being vibrated by the indentations or sinuosities of the groove, reproduces the sounds that made them. In the prior art the reproducing stylus and sound record were brought in operating relation to each other in two ways. The sound record was mechanically conveyed across the reproducing stylus, or the reproducer and its stylus were mechanically conveyed across the record. By one or the other of these means the stylus was kept in engagement with the record and accommodated to the shifting positions of its operative portions. In the patent in suit such independent means are dispensed with. The stylus is made to engage with the grooves in the record tablet, is vibrated laterally by its undulations, and guided or propelled at the same time with its diaphragm attachment across the face of the tablet, the successive portions of the groove reproducing the sound waves, which are transmitted to the air. The sound records are made of hard, indestructible material and, as stated in one of respondent's affidavits, the groove impressed therein "serves the twofold purpose of vibrating the stylus and producing the necessary vibrations in the diaphragm of the sound box, and also of automatically propelling the stylus in the groove across the surface of the record without a feed screw or other mechanism independent of the record itself." The method of doing that is the subject-matter of claim 5, and the means for performing the method is the subject-matter of claim 35. They are, respectively, as follows: "No. 5, the method

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of reproducing sounds from a record of the same, which consists in vibrating a stylus and propelling the same along the record, substantially as described. No. 35 is a sound-producing apparatus, consisting of a traveling tablet having a sound record framed thereon and a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described."

We may now understandingly consider the new matter which was relied on in the courts below. The first in importance of these is that the patent in suit is for the same invention of certain foreign patents and expired with them. These patents consist of three French patents to Emil Berliner, respectively dated November 8, 1887, May 15, 1888, and July 19, 1890; German patents to Berliner dated November 8, 1887, May 16, 1888, and November 20, 1889; a Canadian patent of February 11, 1893, assigned by W. Suess to Berliner; English patents of November 8, 1887, and May 15, 1888. These patents are presented in an affidavit by the leading counsel for petitioner, accompanied by such comparisons of them with the patent in suit as established, it is contended, the identity of their inventions with its invention, and made applicable and controlling § 4887 of the Revised Statutes, which is as follows:

"SEC. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The affidavits describe not only the reproducer of the patent in suit but also the recorder, and give details of the construction of both, and petitioner, in its briefs, elaborately traces

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the development of Berliner's ideas in comparison with the prior art through three stages, each of which, it is contended "is represented by domestic and foreign patents, obtained or applied for, respectively, in 1887, 1888 and 1889–1892." Each stage, it is insisted, is claimed as an improvement upon the preceding stage, and all of them are but improvements upon the prior art. Berliner did not employ, it is said, any new principles in the reproduction of sound from a sound record, "the difference in the sound reproducing machines employed by him and those of the prior art consisting of modifications of details of construction." And it is further contended that an analysis of the patent in suit demonstrates "that the improvements described and claimed related first, to the recording of sound; and, second, to the reproducing of sound." It is impossible, counsel say, "to seriously contend that the essence of the improvements consist rather in the reproduction of sound than in the recording of sound." It is nevertheless argued that the lower courts so regarded the patent in suit, and by that error adjudged that the foreign patents did not embody Berliner's invention, and that, therefore, the patent in suit did not expire with them. Indeed, it is urged that "in the face" of the "expressed and positive declaration of the patentee as to what are the features of his invention, the courts below not only held that the patent included other features not enumerated by Berliner, but went even further, and held that the features which Berliner did enumerate as the features of his invention are not the principal features of his invention, but are mere minor details." This is a misapprehension of the view of the courts below. They confine themselves, as it was proper to do, to the claims in suit and to the invention exhibited in them, and in considering the relation of the patent in suit with foreign patents they distinguished between what the Circuit Court denominates the "broad and basic invention" covered by those claims and the "minor part" shown in the foreign patents. Petitioner attempts to make the recording and reproduction of sounds essential parts of one invention, of which the claims are

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but parts. The purpose is to identify the invention of the patent with every one of the foreign patents and bring the case under what is conceived to be the doctrine of *Siemens* v. *Sellers*, 123 U. S. 276.

That case, it is contended, precludes a distinction between the claims of patent into basic and not basic, principal or subordinate, and establishes that all the claims of a home patent must be so limited as to expire with the expiration of a foreign patent, or if there be more than one prior foreign patent, with the expiration of the one having the shortest term. Upon the expiration of a patent, it is argued, all of its claims expire, since, as this court said in *Siemens* v. *Sellers*, as it is contended, "a patent cannot be considered as running partly to one date and partly to another, for this would be productive of endless confusion. In other words, a patent cannot expire in parcels, it cannot have a plurality of terms." Therefore it is contended that it is the patent, and not the separate claims thereof, which are by the statute limited to expire with the foreign patent. *Siemens* v. *Sellers* is cited for this doctrine, as we have said, and also the following cases: *Western Electric Co.* v. *Citizens' Telegraph Co.*, 106 Fed. Rep. 215; *Sawyer* v. *Spindle Co.*, 133 Fed. Rep. 238, affirmed in 143 Fed. Rep. 976; *Thomson & Houston Co.* v. *McLean*, 153 Fed. Rep. 883.

*Siemens* v. *Sellers* is especially relied upon, and whatever there is in the other cases that support the contention of petitioner is based on that case. In *Siemens* v. *Sellers* the patent passed upon was for an improved regenerator furnace, so called, and the question presented was whether it was identical with that described in an expired English patent. The court said (p. 283):

"We have carefully compared the two patents, the English and American, and can see no essential difference between them. They describe the same furnace in all essential particulars. The English specification is more detailed, and the drawings are more minute and full; but the same thing is described in both. There is only one claim in the English patent, it is true. But that claim, under the English patent system, entitled the

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patentees to their entire invention, and is at least as broad and comprehensive as all four claims in the American patent."

It will be observed, therefore, that there was no distinction in the subject-matter of the claims. There was a difference in the number of the claims arising from the difference in the patent systems, but the claims were coextensive in substance and in invention. There was no question, therefore, of a difference in claims covering different inventions, but such contingency, it is contended, is embraced in the following passage (p. 283):

"It is contended by the counsel of the complainants that the American patent contains improvements which are not exhibited in the English patent. But if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempt from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion."

This passage must be construed by what precedes it. It was said that there was no essential difference between the patents. "They described the same functions in all essential particulars," is the language used. "The principal invention," therefore, was "the same in both," and the improvements, which it was asserted the American patent contained, did not destroy its essence or its identity with the English patent, necessarily, therefore, did not save it "from the operation of the law." And the court meant no more than that. It was not said that a patentable improvement could not be made which could be secured by a patent which would endure beyond the expiration of a prior foreign patent for that which was improved. Such a ruling would contravene the right given by the statute. Section 4886 provides that "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or *any new and useful im-*

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*provement thereof* . . . may obtain a patent therefor." The improvement would be the invention and would endure for the period given to it by law. Besides, a patent may embrace more than one invention. *Steinmetz* v. *Allen*, 192 U. S. 543. A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents. So may other dependent and related inventions. If patented separately a foreign patent for either would not affect the other. Why would such effect follow if they are embraced in the same patent? What policy of the law would be subserved by it? The purpose of § 4887 of the Revised Statutes is very clear. It is that whenever an invention is made free to the public of a foreign country it shall be free in this. The statute has no other purpose. It is not intended to confound rights and to make one invention free because another is made so. This will even more distinctly appear in case of a patent for a combination, such as claim 35 is of the patent in suit.

A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—distinct from them. They, if new, may be inventions and the proper subjects of patents, or they may be covered by claims in the same patent with the combination.

But whether put in the same patent with the combination or made the subjects of separate patents, they are not identical with the combination. To become that they must be united under the same coöperative law. Certainly, one element is not the combination nor in any proper sense can it be regarded as a substantive part of the invention represented by the combination, and it can make no difference whether the element was always free or becomes free by the expiration of a prior patent, foreign or domestic. In making a combination an inventor has the whole field of mechanics to draw from. This view is in accordance with the principles of the patent laws. It is in accordance with the policy of § 4887 of the Revised

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Statutes, which is urged against it. That policy is, as we have seen, that an American patent is not precluded by a foreign patent for the same invention, but if a foreign patent be granted, an American patent is granted upon the condition that the "invention shall be free to the American people whenever, by reason of the expiration of the foreign patent, it becomes free to the people abroad." *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36. And all of the provisions of the statutes are accommodated. Each invention is given the full period of seventeen years, which the statute prescribes for it.[1] If limited at all, it can only be by a prior foreign patent identical with it. Nor can confusion result. Why should it? It does not result from analogous applications of the patent laws. Claims are independent inventions. One may be infringed, others not, and the redress of the patentee is limited to the injury he suffers, not by the abstract rights which have been granted him in other claims. One claim may be valid, all the rest invalid; invalid for the want of some essential patentable attribute. But what is good remains and is unaffected by its illegal associates. In such cases the patent does not stand or fall as a unity. If claims may be separable as in the case of infringement of some and not of others; if claims can be separable, though some are invalid, may they not be separable when some of them have expired? Certainly confusion cannot arise in one case more than in the other. Confusion might result in such circumstances as were presented in *Siemens* v. *Sellers*, where it was sought to extend the principal invention—indeed the only invention—by the date of a mere formal improvement of it. In such case, as

[1] Sec. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

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it was said, the patent "cannot be construed as running partly from one date and partly from another."

In the light of these principles let us examine the foreign patents relied upon. Special stress is given to German patent No. 53,622 to Berliner, and it is contended that it expired before this suit was brought, and that the patent in suit expired with it. The patent refers to two others in which, it is said, there is described an apparatus for the recording of sound, and that "the present invention [that covered by the patent] relates to the instrument in the part of the apparatus performing the reproduction." The instrument is exhibited by a drawing and is specifically described. Petitioner says that that instrument covered the most important part of the Berliner gramophone, and that Berliner in his Franklin Institute lecture specifically stated that of the three principal features of the improvement of the patent in suit the *reproducer* formed one. But granting that he did say so, and that it is so, the inquiry yet remains, is it identical with the invention of claim 5 or claim 35 of the patent in suit? It is not of claim 5, for that is for a method, and a method is independent of the instruments employed to perform it. It is not of claim 35, for that claim is for a combination, and one element is not the combination. Indeed, all of the elements are not. To be that—to be identical with the invention of the combination—they must be united by the same operative law. Of course, an element is a part, an essential part of the combination, and enters as an operative agent in the performance of its functions. But this does not make it identical with the combination. It may be novel, patentable of itself, subject to its own special monopoly, or it may be free for everybody's use, but whether free or not free, free when the combination was formed (invented) or became free, it is not identical with the combination. It follows, therefore, that the expiration of the German patent No. 53,622 for the reproducer did not affect the duration of the patent in suit so far as claims 5 and 35 are concerned, even though such reproducer is made the subject of one of the claims of the patent in suit. To some

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extent these remarks are applicable to all the foreign patents relied on by petitioner.

In the French patent No. 207,090, granted to Berliner, the claims cover a recorder as well as a reproducer of sound. They are practically the same instrument, and are denominated respectively in the patent as a recording sound box and as a reproducing sound box. As the first, to quote the patent, it is used to "trace acoustic curves upon the surface" of a sound record. As the second, that is as a reproducer, it reproduces the sounds which made the "acoustic curves."

It is contended by respondent that the recorder and reproducer of the patent in suit differ in certain details of construction and operation from the recorder and reproducer of the German and French patents, but the Circuit Court said that that question could only be determined by expert testimony, and assumed the details to be substantially identical. We shall do the same, and are of the opinion, for the reasons which we have given, that the expiration of those patents, the French patent as well as the German patent, did not carry with them the expiration of the inventions exhibited in claims 5 and 35 of the patent in suit.

It is further contended that the patent in suit expired with the British, French and German patents of November 8, 1887, to Berliner. These patents, it is contended, are for the "basic invention" covered by claims 5 and 35 of the patent in suit. The patents are identical, and therefore we consider only the British patent. The reasoning by which this is attempted to be supported is somewhat circuitous. Among the publications referred to in petitioner's answer and introduced in evidence was one in The Electrical World for November 12, 1887, one published in the same paper August 18, 1888, and a paper read by Berliner before the Franklin Institute May 16, 1888. In these publications there is description of the invention, and in the paper read before the Franklin Institute Berliner describes the genesis of his ideas and the ideas of others in the process of recording and reproducing sounds. He entered into a some-



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what detailed description of his invention, exhibited a machine and gave an illustration of its powers, among others letting the audience "listen to some phonaulograms," which he said he had prepared within two weeks before in Washington. This was urged as a public use, but the Circuit Court decided that neither that lecture and exhibition nor the description in The Electrical World in 1887, constituted a public use within the meaning of the statutes. And the court also decided that the broad claims of the patent in suit were not made a part of the earlier application for patent No. 564,586, and that that omission, even when combined with such exhibition and publication, was not an abandonment and forfeiture of those claims. The Circuit Court of Appeals did not discuss those questions or express an opinion upon them, but decided that the specifications in the application for patent No. 564,586, issued subsequently to the patent in suit, were broad enough to warrant the making of the claims in controversy (5 and 35) and that the second application could fairly be considered a continuation of the first, and antedated the alleged public use. If this be so, petitioner contends, the two patents must be treated as one patent covering one invention, that described in No. 564,586, and, it is further contended, that as that invention was previously patented by the three foreign patents, the patent in suit expired with them. The reasoning is extremely technical, and we may adopt the answer made to it by the Circuit Court: "An examination of the drawings of the prior British patent shows that there is omitted therefrom Figure 10 of the United States patent No. 564,586, which was the only figure illustrating the form of the device covered by the claims here in suit. There is nothing either in the specifications or drawings of the said British patent which describes, illustrates or shows the methods or apparatus of the claims here in suit. These considerations apply equally to said earlier German and French patents."

It would be a very strange application of § 4887 to hold that it covers what is omitted from a foreign patent as well as what is included in such patent. At any rate, whatever was the rul-

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ing in the prior suit, in the suit at bar the Circuit Court and the Circuit Court of Appeals both held that the inventions of claims 5 and 35 of the patent in suit were not exhibited in the British patent, and that is so far a question of fact, pertains so much to evidence rather than to a construction of the patents, that we may well remit it, as we have other questions of the kind, to the merits of the case.

There yet remains the Suess-Canadian patent to be considered. It was granted to Berliner as the assignee of Suess, and Judge Townsend, in the Circuit Court, said that the patent disclosed and broadly claimed the invention covered by the claims in suit, and on account of it defendant (petitioner here) contended that Berliner thereby admitted that Suess was the inventor of the reproducing apparatus of those claims; that in his application as the assignee of Suess he abandoned the broad claim in suit, and that as the patent covered the invention of the patent in suit and expired in 1899, the patent in suit expired with it. The learned judge further said:

"The evidence introduced in the original suit showed and the court found on the Suess patent 427,279 that Suess was merely an improver of a particular form of swinging arm device, and some of the language used in the specifications of this Suess-Canadian patent, which, however, was not before the court in the original suit, seems to indicate that its structure is merely an improvement on the broad Berliner invention, and Berliner himself afterwards applied for and obtained a Canadian patent for the broad invention covered by the claims here in suit."

The court, however, decided that the Canadian patent in terms described and claimed "the broad generic invention of Berliner covered by the claims here in suit," and to establish this quoted claims 5, 7, and 11 [1] of the Canadian patent and concluded that if that patent expired in 1899 the patent in suit also expired. The court, however, decided, expressing, how-

[1] 5. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound-conveying tube and a diaphragm and stylus mounted at one end of the tube;

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ever, some hesitation, that the patent did not then expire, stating the rule to be, as established by the cases, that a United States patent is limited by the term expressed in the foreign patent and that it is not affected by any lapse or forfeiture of any portion of the term by means of any condition subsequent.

The patent was granted for the term of eighteen years from its date, February 11, 1893, but provides as follows:

"The partial fee required for the term of six years having been paid to the Commissioner of Patents, this patent shall cease at the end of six years from date, unless at or before the expiration of the said term the holder thereof pay the fee required for the further term or terms as provided by law."

And it appears that the fee for the second term of six years was not paid, and that because of such non-payment the patent expired February 11, 1899. The contention of petitioner is, as has been seen, that the patent in suit expired at the same date by virtue of § 4887, Revised Statutes. The necessary effect of that section, it is contended by petitioner, being that if by any act of omission of the patentee the invention becomes free in a foreign country it becomes free in this country. The contention of the respondent is that the domestic patent endures for the longest possible term of the foreign patent. In other words, endures for the period expressed in the grant, and is not dependent upon or "subject to be terminated by the occurrence or non-concurrence by certain facts which would require extraneous proof." These opposing contentions are discussed at great length by counsel and a number of cases are cited.

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of a freely swinging supporting frame for the said producer mechanism, substantially as described.

7. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound-conveyer, and a diaphragm and stylus mounted at one end thereof; of a supporting frame for the said reproducer, loosely pivoted to swing freely both laterally and vertically, substantially as described.

11. In an apparatus for reproducing sounds from a rotating record tablet, a reproducing stylus mounted to have a free movement over the surface of the record tablet, substantially as described.

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We omit, however, the consideration of the cases and comment upon the arguments based upon them, as we think the questions involved are determined by *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 381. It is there decided that "the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent." And it is further said that the duration of the United States patent is not "limited by any lapsing or forfeiture of any portion of the term of such foreign patent by means of the operation of a condition subsequent, according to the foreign patent."

From these views it follows that there was no abuse of discretion in granting the preliminary injunction, and the decree is

*Affirmed.*

## LEEDS & CATLIN COMPANY v. VICTOR TALKING MACHINE COMPANY (NO. 2).

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 81. Argued January 18, 1909.—Decided April 19, 1909.

*Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, *ante*, p. 301, followed as to validity of Berliner patent for talking machines.

There is a distinction between the article which a combination machine deals with and the constituent elements composing the combination; and while it may not be infringement to supply the unpatented article dealt with by the combination, it is infringement to make and supply an unpatented element, necessary for the operation of the combination. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, distinguished.

The combination itself, regardless of whether any or all of the elements be old or new, is the invention and, in law, is as much a unit as a single or non-composite instrument and one using or contributing to its use without permission infringes it.

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Whether the elements of a combination patent are or are not patented is immaterial.

Where an element of a combination becomes unfit by deterioration there is a destruction of the combination and a renewal of that element amounts to reconstruction.

The right of substitution or resupply of elements of a combination extends only to repair and replacement made necessary by deterioration so as to preserve its fitness; license goes no further and does not extend to furnishing such elements to increase effectiveness or variety of the results of the combination.

Unpatented elements of a patented combination may not be sold for use therewith although they may legally be sold for use with other machines, and so *held* that it was infringement to sell record discs specially adapted therefor to the users of a patented talking machine although such discs were not patented and could lawfully be used in combination with other talking machines.

150 Fed. Rep. 147; 154 Fed. Rep. 58, affirmed.

THE facts are stated in the opinion.

*Mr. Louis Hicks* for petitioner:

The sound record is a temporary element of the combination forming the machine of the patent in suit and it is intended that the sound record shall frequently be replaced. The machine has no other use. It is well settled law that purchasers of such combinations from the patentee or his licensees have the right to replace such temporary parts, and that any manufacturer has the right to sell such parts to such purchasers for such purpose. The courts below, therefore, erred in holding that defendant violated the injunction by selling records with the intent that the same should be used in combination with the other elements of claim 35, in machines sold by complainants or their licensees combined with such records. *Morgan Envelope Co.* v. *Albany Paper Co.*, 40 Fed. Rep. 577; *S. C.*, 152 U. S. 425.

The Circuit Court of Appeals, following the decisions of this court, has held that the purchaser of a patented combination has the legal right immediately to substitute for an important or essential element of the combination one which he conceives

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to be better suited to his purposes, even though such element was intended to be permanent; and that any one has an equal right to make and sell such elements to such purchaser for such purpose. *Thomson-Houston Electric Co.* v. *Kelsey Co.*, 75 Fed. Rep. 1005. See also *Chaffee* v. *Belting Co.*, 22 How. 217; *Wilson* v. *Simpson*, 9 How. 109; *Mitchell* v. *Hawley*, 16 Wall. 544, 548; *Adams* v. *Burke*, 17 Wall. 453, 456; *Edison Light Co.* v. *Peninsular Co.*, 101 Fed. Rep. 831, 835, 837.

No question of contributory infringement is here involved. Judge Shipman's decision in *Am. Graph. Co.* v. *Leeds*, 87 Fed. Rep. 873, cited by the Circuit Court, bears no analogy to the case at bar. Judge Grosscup's opinion in *Am. Graph. Co.* v. *Amet*, 74 Fed. Rep. 789, supports petitioner's contentions.

Complainants and their licensees having sold the combination of the patent to purchasers without restriction as to the records to be used to replace those purchased, it is well settled law that defendant has the right to sell records to such purchasers for use in replacing records purchased with machines from complainants and their licensees. *Heaton Co.* v. *Eureka Co.*, 77 Fed. Rep. 288; *Cortelyou* v. *Johnson*, 207 U. S. 196; *Keeler* v. *Folding Bed Co.*, 157 U. S. 659, 666; *Hobbie* v. *Jennison*, 149 U. S. 355; *Adams* v. *Burke*, 17 Wall. 453; *Bement* v. *Harrow Co.*, 186 U. S. 70; *Hartell* v. *Tilghman*, 99 U. S. 547; *Bobbs-Merrill Co.* v. *Strauss*, 210 U. S. 339.

Defendant's disc sound-records are unpatented articles of commerce of the prior art, which defendant could legally sell for use in the United States on mechanical feed-device machines, for export to foreign countries, concededly for repair of machines sold by complainants, and for other lawful purposes. There is no authority holding a party liable as an infringer solely because an article sold by him might be, or was, in fact, used by the purchaser as one element of a patented combination. The tendency of the later decisions is to do away with unwarrantable restrictions upon trade. *Bullock Co.* v. *Westinghouse Co.*, 129 Fed. Rep. 105, 111; *Cortelyou* v. *Johnson*, 145 Fed. Rep. 933; *Snyder* v. *Bunnell*, 29 Fed. Rep. 47, 48; *Standard*

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*Co.* v. *Computing Co.*, 126 Fed. Rep. 639; *Canda* v. *Michigan Co.*, 124 Fed. Rep. 486.

Complainants and their licensees, by selling the sound reproducing apparatus of claim 35 of the patent in suit, impliedly licensed the purchaser thereof to combine a suitable record therewith, in every case where the apparatus was sold without a sound-record combined therewith, and for that purpose to purchase such a record from persons other than complainants or their licensees. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 432; *Heaton Co.* v. *Eureka Co.*, 77 Fed. Rep. 288, 300; *Edison El. Co.* v. *Peninsular Co.*, 101 Fed. Rep. 831, 836; *Thomson-Houston Co.* v. *Illinois Co.*, 152 Fed. Rep. 631; *Roosevelt* v. *Western El. Co.*, 20 Fed. Rep. 724.

The finding of the Circuit Court places an intolerable burden upon the defendant's conceded right to make and sell the unpatented sound-records of the prior art. *Thomson-Houston Co.* v. *Kelsey Co.*, 75 Fed. Rep. 1005; *Cortelyou* v. *Johnson*, 207 U. S. 196.

The question raised in the Circuit Court upon the motion to punish defendant for contempt was an entirely new question. The act for which defendant was held to be in contempt was not included in the preliminary injunction or the decree therefor. Under such circumstances the motion should have been denied and complainants left to raise the question by appropriate proceedings other than a motion to punish for contempt. *Enterprise Co.* v. *Sargent*, 48 Fed. Rep. 453, 454; *Bate* v. *Eastman*, 11 Fed. Rep. 902 (Blatchford, C. J.); *Allis* v. *Stowell*, 15 Fed. Rep. 242, 244 (Dyer, J.); *Temple Pump Co.* v. *Goss Co.*, 31 Fed. Rep. 292 (Blodgett, J.); *Truax* v. *Detweiller*, 46 Fed. Rep. 117 (Lacombe, C. J.); *Bonsack Mach. Co.* v. *National Co.*, 64 Fed. Rep. 858 (Lacombe, C. J.); *United States Co.* v. *Spalding*, 93 Fed. Rep. 822 (Wheeler, D. J.).

Complainants presented no proof whatever that the sound-records sold by defendant were in a single instance used or intended to be used in any infringement of the claims in suit; no proof whatever that the sound-records sold by defendant were

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used for the reproduction of sound on any machine of any construction. The mere making and selling of an unpatented article is not an infringement of a claim for a combination of which that article is an element.

The record in the contempt proceedings includes the record in the injunction proceedings. The patent in suit having expired before the suit was begun, the Circuit Court was without jurisdiction to entertain the suit. The claims in suit, moreover, are void. Hence the judgment finding defendant in contempt was void, because beyond the jurisdiction of the court, and should be set aside, because, the claims being void, the injunction was improperly granted.

*Mr. Horace Pettit* for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ was issued to bring up for review the judgment of the Circuit Court, affirmed by the Circuit Court of Appeals, adjudging petitioner guilty of contempt of court for violating the injunction which has just been considered in No. 80, and to pay a fine of $1,000, one-half to the United States and one-half to complainants in the suit, respondents here.

The injunction, as we said in the opinion in No. 80, enjoined petitioner, the Leeds & Catlin Company, from manufacturing, using or selling the method expressed in claim 5 of letters patent No. 534,543 to Emil Berliner, dated February 19, 1895, or the apparatus covered by claim 35.

On the fifteenth of November, 1906, respondent, Victor Talking Machine Company, filed a petition in the Circuit Court, charging petitioner with a violation of such injunction. A rule was issued against the Leeds & Catlin Company to show cause why an attachment should not issue against it for contempt of court for violating the injunction, which came on to be heard upon supporting and opposing affidavits and the answer of the Leeds & Catlin Company.

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A judgment was entered adjudging the Leeds & Catlin Company guilty of contempt, which was affirmed by the Circuit Court of Appeals. 150 Fed. Rep. 147; 154 Fed. Rep. 58.

The answer of petitioner referred to the record in No. 80, and in this court it is stipulated that that record shall be used as part of the record in the pending cases, and certain of the defenses there made are repeated here. For instance, it is contended, and the record in No. 80 is adduced to support the contention, that (1) the patent in suit having expired before the suit was begun, the Circuit Court was without jurisdiction to entertain the suit; (2) claims in suit being for the functions of a machine are void. And it is further contended that "hence the judgment finding defendant [petitioner] in contempt (*a*) was void, because beyond the jurisdiction of the court; and (*b*) should be set aside, because the claims being void the injunction was improperly granted." These contentions are disposed of by the opinion in No. 80, and we may confine our discussions to the other defenses made in the contempt proceedings.

The facts are practically undisputed, and a detail of them is unnecessary. It is enough to say that petitioner is a manufacturer of disc records, such as are described in No. 80. That is, a record upon which is inscribed a lateral undulating groove of even depth, which, when the disc is revolved, compels the reproducing stylus to be vibrated and propelled across its face.

It will be observed how important the record is to the invention embodied in the claims. It is the undulations in the side walls of the spiral groove which vibrate the stylus back and forth, transmitting the recorded sound waves to the diaphragm, at the same time propelling the stylus as it engages with the record. If a comparison may be made between the importance of the elements, as high a degree (if not a higher degree) must be awarded to the disc with its lateral undulations as to the stylus. It is the disc that serves to distinguish the invention—to mark the advance upon the prior art. "As to the reproducing stylus," as is said by respondent, "it is only necessary that it should be shaped for engagement with the record

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and so positioned and supported as to be free to be vibrated and propelled by the record."

The lower courts found that most of the sales (we quote from the opinion of the Circuit Court of Appeals) of the records by petitioner "were knowingly made to enable the owners of the Victor Talking Machines to reproduce such musical pieces as they wished by the combination of the Leeds & Catlin record with said machines; and that the Leeds & Catlin Company made no effort to restrict the use to which their records might be put until after motion to punish for contempt had been made; that the only effort at such restriction ever made was to answer upon the face of the record and notice to the effect that such record was intended and sold for use with the 'feed-device machine;' that the records sold by plaintiff in error [petitioner] were far more frequently bought to increase the repertoire of the purchaser's Victor machine than to replace worn-out or broken records." The "feed-device machine" referred to by the court was a talking machine bought by petitioner after, as petitioner avers, the Circuit Court of Appeals affirmed the injunction, and in connection with which it sold, as it also avers, and used, its sound records. The court assumed, for the purpose of the cause, that the feed-device machine might be regarded as not infringing any of the rights of the Victor Company under the Berliner patent. The court further found that it was established by the evidence that the discs were equally suitable for that machine as for the machine of the Victor Company, but that it "was not at or before the time of beginning this proceeding a practically or commercially known reproducer of musical or spoken sound, whereas the Victor machine, embodying the claims of the Berliner patent here under consideration, was at such times widely known and generally used, and that the plaintiff in error [petitioner] knew, and sold its records with the knowledge, that if its output was to be used at all by the public it would be used with the Victor machine, and in the combination protected by the claims of the Berliner patent, before referred to." And the court concluded that upon these

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facts it was clear that petitioner had "made and sold a single element of the claims of the Berliner patent, with the intent that it should be united to the other elements and complete the combination. And this is infringement. *Heaton Peninsula Co.*, v. *Eureka Co.*, 77 Fed. Rep. 297; adopted by this court, *Courtelyou* v. *Lowe*, 111 Fed. Rep. 1005."

Petitioner contests the conclusion and opposes it by the principle, which, it is contended, is established by cases in this court, as well as at circuit, that "the person who has purchased a patented combination from the patentee has the right to replace an unpatented element of the combination and for such purpose to purchase such element from another than the patentee or his licensee." To bring this principle in clear relief it is said that "the majority of the Circuit Court of Appeals has held that such replacement of a single unpatented element of the combination is reconstruction and not within the rights of the purchaser of the patented combination from the patentee." And, to complete its argument, petitioner adds that where an inventor so arranges the parts of his patented combination that it cannot satisfactorily, successfully or usefully be continued in use, without successive replacements of one of its elements, "the replacement of such element, if unpatented, by the purchaser of the combination from the patentee is in *accordance with the intention of the patentee and not a reconstruction* of the patented combination, but an act within the rights of the purchaser." For these principles *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425; *Wilson* v. *Simpson*, 9 How. 109; *Goodyear Co.* v. *Jackson*, 112 Fed. Rep. 146, are adduced.

The question in the case, therefore, is single and direct, and its discussion may be brought to a narrow compass. Its solution depends upon the application of some rudimentary principles of patent law.

A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or non-composite instrument.

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Whoever uses it without permission is an infringer of it. Whoever contributes to such use is an infringer of it. It may be well here to get rid of a misleading consideration. It can make no difference as to the infringement or non-infringement of a combination that one of its elements or all of its elements are unpatented. For instance, in the case at bar the issue between the parties would be exactly the same, even if the record disc were a patented article which petitioner had a license to use or to which respondent had no rights independent of his right to its use in the combination. In other words, the fact that the disc sold by petitioner is unpatented does not affect the question involved except to give an appearance of a limitation of the rights of an owner of a Victor machine other than those which attach to him as a purchaser. The question is, What is the relation of the purchaser to the Victor Company? What rights does he derive from it? To use the machine, of course, but it is the concession of the argument of petitioner that he may not reconstruct it. Has he a license to repair deterioration, and when does repair become reconstruction? It would seem that on principle when deterioration of an element has reached the point of unfitness there is a destruction of the combination and a renewal of the element is a reconstruction of the combination. And it would also seem on principle that there could be no license implied from difference in the durability of the elements or periodicity in their use. This, however, is asserted, and we come to the consideration of the cases upon which the assertion is based, and how far it has application under the facts of this record.

Great stress is put upon *Morgan Envelope Co.* v. *Albany Co.*, *supra*. That case was a bill in equity for the infringement of three letters patent, one for a "package of toilet paper," known as an "oval roll" or "oval king" package; one for a "toilet paper fixture," and one for an "apparatus for holding toilet paper." The first patent was declared invalid for want of novelty. Of the other two it was said that they were practically the same and were for a "combination of the paper roll de-

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scribed in the former patent, with a mechanism for the delivery of the paper to the user in an economical manner." It was conceded that the mechanism of the patents involved patentable novelty, but it was contended that it being constructed for the purpose of delivering paper to users in convenient length such a roll was not a proper part of the combination, and that, conceding it was a part of the combination, there was no infringement. The first contention, the court said, raised the question whether, when a machine is designed to manufacture, distribute or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. In commenting on the question the court expressed the view that if the contention could be sustained "it would seem to follow that the log which is sawn in the mill, the wheat which is ground by rollers, the pin which is produced by the patented machine, the paper which is folded and delivered by the printing press," might be claimed as an element of a combination. The court, however, refrained from expressing an opinion upon the point, because it conceived that the facts of the case failed to sustain the charge of infringement. And this on the ground that the defendants in the suit had neither made, sold nor used the patented mechanism, except as they purchased it from the patentee, and the only acts proven against them were that they sold rolls of paper of their own manufacture with fixtures manufactured and sold by the plaintiff, the fixtures having been obtained by defendants from the original purchasers of the patented combination; and also of selling oval rolls of paper of their own manufacture to persons who had previously purchased fixtures and paper from the plaintiff, with the knowledge and information that the paper so sold was to be used in connection with plaintiff's fixtures. The court stated the question to be whether, considering the combination of the oval roll with the fixture to be a valid combination, the sale of one element of *such* (italic ours) a combination with the intention that it should be used with the other elements was an infringement. The answer was in the

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negative. The court, however, stated, that there were cases to the effect that the sale of one element of a combination with intention that it should be used with another was an infringement, but decided that they had no application to one where the element made by the alleged infringer was "an article of manufacture, perishable in its nature, which it is the object of the mechanism to deliver, and must be renewed periodically whenever the device is put to use." The case, therefore, is not a precedent for the decision of that at bar. Not one of the determining factors there stated exists in the case at bar. If the operative relation of the paper roll to the mechanism was as illustrated (and the court left no doubt that it was), that is, of the log to the saw in the mill, wheat to the rollers which grind it, pins which are produced by a patent machine; in other words, in no more operative relation than a machine and its product are, the invalidity of the combination was hardly questionable. And, besides, it was made a determining circumstance that the paper perished by its use, and a periodical renewal was indicated to be a renewal "whenever the device was put to use." The case has no principle or reasoning applicable to the case at bar. The combination in the case at bar is valid, as we have unhesitatingly declared. The function it performs is the result of the joint action of the disc and the stylus. The disc is not a mere concomitant to the stylus; it co-acts with the stylus to produce the result. Indeed, as we have seen, it is the distinction of the invention, constituting, by its laterally undulating line of even depth and the effect thereof, the advance upon the prior art. To confound its active coöperation with the mere passivity of the paper in the mechanism described in the *Morgan Envelope Company case* is not only to confound essential distinctions made by the patent laws, but essential distinctions between entirely different things. Besides, the lower courts found that the discs were not perishable. As said by the Court of Appeals, by Judge Hough: "Disc records are fragile, *i. e.*, brittle and easily broken; but they are not perishable, *i. e.*, subject to decay by their inherent qualities, or consumed by few uses

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or a single use. Neither are they temporary, *i. e.*, not intended to endure; on the contrary, we find that they are capable of remaining useful for an indefinite period, and believe they usually last as long as does the vogue of the sounds they record."

Can petitioner find justification under the right of repair and replacement as described in *Wilson* v. *Simpson*, 9 How. 109, and *Chaffee* v. *Boston Belting Co.*, 22 How. 217? The Court of Appeals, in passing on these cases, considered that there was no essential difference between the meaning of the words "repair" and "replacement." That they both meant restoration of worn-out parts. This distinction was recognized in *Wilson* v. *Simpson*, *supra*, where it is said that the language of the court in *Wilson's and Roussan's Case*, 4 How. 709, did not permit the assignee of a patent to make other machines or reconstruct them in gross upon the frame of machines which the assignee had in use, "but it does comprehend and permit the resupply of the effective ultimate tool of the invention, which is liable to be often worn out or to become inoperative for its intended effect, which the inventor contemplated would have to be frequently replaced anew, during the time that the machine as a whole might last." But there is no pretense in the case at bar of mending broken or worn-out records, or of repairing or replacing "the operative ultimate tool of the invention" which has deteriorated by use. The sales of petitioner, as found by the courts below, and as established by the evidence, were not to furnish new records identical with those originally offered by the Victor Company, but, to use the language of Judge Lacombe in the Circuit Court, "more frequently in order to increase the repertory of tunes than as substituted for worn-out records."

The right of substitution or "resupply" of an element depends upon the same test. The license granted to a purchaser of a patented combination is to preserve its fitness for use so far as it may be affected by wear or breakage. Beyond this there is no license.

It is further contended by petitioner that the disc records,

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being unpatented articles of commerce which could be used upon the mechanical feed device machine or exported to foreign countries, or concededly for repair of machines sold by respondent, petitioner could legally sell the same. A detailed comment on this contention or of the cases cited to support it we need not make. The facts of the case exclude petitioner from the situation which is the foundation of the contention. The injunction did not forbid the use of the records, except in violation of claims 5 and 35 of respondent's patent. The judgment for contempt was based upon the facts which we have detailed and they show a sale of the records for use in the Victor machine, "an entirely voluntary and intentional" (to use the language of Judge Lacombe) contributory infringement.

We have seen that the Circuit Court of Appeals assumed, for the purposes of this cause, that the feed device machine was not an infringement of the machine of the patent. We may assume the same, and we are relieved from reviewing the very long and complex affidavits submitted by the petitioner to explain the same, petitioner's relation to it or its position in the art of sound reproduction. Petitioner was found guilty of selling records which constituted an element in the combination of the patent in suit, and for that petitioner was punished. Upon whatever questions or contentions may arise from the use of the feed device machine we reserve opinion.

We have not reviewed or commented upon the other cases cited respectively by petitioner and respondents in support of their contentions, deeming those we have considered and the principles we have announced sufficient for our decision.

*Judgment affirmed.*



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# VAN GIESON *v.* MAILE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 121. Submitted April 6, 1909.—Decided April 19, 1909.

However vexatious the conduct of a litigant may be his property should not be sacrificed by reason of the court's action; and it appearing, in this case, that the existence of an order in regard to a sale of property under execution made the sale disastrous, it was proper, whether the order was valid or not, to set the sale aside and order a reconveyance on payment into court of the amount of the judgment.

THE facts are stated in the opinion.

*Mr Henry Van Gieson*, appellant *pro se*.

There was no brief for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellee to set aside a sale on execution to Van Gieson. The bill alleges the bringing of an action for taxes by a collector, recovery of a judgment on default, and the issue of execution thereupon. It sets up various supposed technical defects in the summons and subsequent proceedings, but these do not need to be stated. It is enough to say that on the ground of such supposed defects motions were made, in the District Court where the judgment was rendered, that the execution be recalled, that the service of summons be set aside and quashed, and that the High Sheriff be ordered not to sell under the execution until further order of the court. This order was made and a time was fixed for the

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hearing of the motion at an early day. Nevertheless the sheriff proceeded with the sale as it had been advertised, on the day before that fixed for the hearing, and sold three lots of land, at a very inadequate price, to Van Gieson, an assistant of his. He gave notice pending the sale that at the fall of the hammer he should require a deposit of fifty per cent of the purchase money for each parcel then unsold, a condition not contained in the notice of sale and not enforced against Van Gieson. The bill is founded on the alleged defects in the proceedings before execution as well as in the sale and prays to have the judgment declared void, and, as we have said, the sale set aside. The Supreme Court of the Territory set aside the sale and upon the plaintiff paying into court the amount of the judgment ordered a reconveyance, whereupon Van Gieson appealed to this court.

The ground on which the Supreme Court went was the single short point that the existence of the order, whether valid or not, was what made the sale disastrous. We see no reason for not accepting this conclusion. However vexatious the conduct of the appellee may have been, his property should not be sacrificed by reason of the act of a court.

*Decree affirmed.*

## BOQUILLAS LAND AND CATTLE COMPANY v. CURTIS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 133. Argued April 7, 1909.—Decided April 19, 1909.

Under § 3198, Rev. Stat. of Arizona of 1887, the common-law doctrine of riparian rights does not now obtain in that Territory, and, as held by the Supreme Court of the Territory, the doctrine of appropriation was recognized and to some extent in force prior to and since 1833 in the State of Sonora now a part of that Territory.

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Confirmation of an estate does not enlarge it, and where the original Mexican title did not carry riparian rights the mere confirmation thereof by the United States does not give such rights to the confirmee.

The legislative act of Arizona, Howell's Code of 1864, c. 61, § 7, adopting the common law of England was merely the adoption of a general system of law in place of the Spanish Mexican general system which was simultaneously repealed, and the regulation of and rights to water were by the same act made subject to the natural and physical condition of the Territory and the necessities of its people; and this court sustains the Supreme Court of the Territory in its interpretations of the qualifications imposed on the general adoption of the common law in respect to the use of water.

The right to use water is not confined under the customary law of Arizona to the riparian proprietors. Where the riparian proprietor is entitled under a general statute to have the damages to his land taken for withdrawal of water by appropriators assessed, the decree below will not be disturbed because no provision was made for compensation, it appearing in this case that the objection was technical and the point was not discussed below

89 Pac. Rep. 504, affirmed.

THE facts are stated in the opinion.

*Mr. Eugene S. Ives* for appellant:

Riparian rights once vested are property rights and cannot be taken away except by the exercise of the right of eminent domain. Long on Irrigation, § 12; Black's Pomeroy on Water Rights, § 9; *Lux* v. *Haggin*, 69 California, 255; *Sturr* v. *Beck*, 133 U. S. 541; 1 Farnham on Water Rights, 282; *Benton* v. *Johncox*, 17 Washington, 277; *S. C.*, 39 L. R. A. 107; 61 Am. St. Rep. 912; *Clark v. Cambridge &c. Co.*, 45 Nebraska, 798; *S. C.*, 64 N. W. Rep. 239; *Yates* v. *Milwaukee*, 10 Wall. 497; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672; *Delaplaine* v. *Railway Co.*, 42 Wisconsin, 214; *Belle* v. *Gough*, 23 N. J. Law, 624; *Water Co.* v. *Raff*, 36 N. J. Law, 635; *Crawford Co.* v. *Hathaway*, 67 Nebraska, 325; *Bigelow* v. *Draper*, 6 N. Dak. 152; *S. C.*, 69 N. W. Rep. 570.

Appellant's ownership within the Mexican grant having been

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continuous since the date of the grant the patent operated as a consummation of such title, and also as a quit-claim of whatever interest the United States acquired by the cession. *Beard* v. *Federy*, 3 Wall. 478; *Knight* v. *Land Association*, 142 U. S. 161; *Herrick* v. *Boquillas Land Co.*, 200 U. S. 96; *Sturr* v. *Beck*, 133 U. S. 541; *Shepley* v. *Cowan*, 91 U. S. 330.

The patent issued by the United States conveyed to the appellant all rights which the United States may have had in the waters of the San Pedro River. Revised Statutes U. S., §§ 2339, 2340.

The effect of these statutes has been definitely settled by this court, and the conclusion reached is that the provisions quoted were a voluntary recognition of a preëxisting right of possession, constituting a valid claim to the continued use and not the establishment of a new one. *Broder* v. *Water Co.*, 101 U. S. 274; *Atchison* v. *Peterson*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670.

The common law doctrine of riparian rights was adopted by the first legislature of Arizona in the code of laws known as the Howell Code. Article 22, Bill of Rights, Howell's Code; Howell's Code, Chapter 55, §§ 1, 2, 3, 4, 5, 7, 17, 25.

The provisions of the Howell Code are not inconsistent with or repugnant to the rights of the riparian proprietor at common law. *Crawford Co.* v. *Hathaway*, 67 Nebraska, 325; *S. C.*, 93 N. W. Rep. 781; *Thorpe* v. *Tenem Ditch Co.*, 1 Washington, 566; *Ellis* v. *Pomeroy Improv. Co.*, 1 Washington, 572; *Geddis* v. *Parrish*, 1 Washington, 587; *Crook* v. *Hewitt*, 4 Washington, 749; *Rigney* v. *Tacoma Light & W. Co.*, 9 Washington, 576; *Isaacs* v. *Barber*, 10 Washington, 124; *Benton* v. *Johncox*, 17 Washington, 277; *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 15 S. D. 519.

Under the Mexican law the right of a riparian owner to the use of water was superior to that of a subsequent appropriator. Such right was preserved and guaranteed by the treaty of cession and could not afterwards be affected by territorial legislation. Kinney on Irrigation, § 292.

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*Mr. H. L. Pickett* and *Mr. Ben Goodrich*, for appellees, submitted:

The common law doctrine of riparian rights does not prevail in Arizona in favor of the owners of land derived by grant from the State of Sonora prior to the Gadsden Purchase of 1854. The provisions of the Howell Code are wholly inconsistent with the doctrine of riparian rights. *Stowell* v. *Johnson*, 26 Pac. Rep. 290; *Clough* v. *Wing*, 17 Pac. Rep. 453; *Willey* v. *Decker*, 73 Pac. Rep. 211; *Boquillas Land & Cattle Co.* v. *Curtis et al.*, 89 Pac. Rep. 504.

Even if the common law doctrine of riparian rights ever did obtain in Arizona, it was abrogated by the act of the legislature of March 10, 1887, Rev. Stat. Arizona, 1887, § 3198, which reads as follows:

"The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this Territory." See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 703.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellant to prevent the defendants from withdrawing water from the San Pedro River and from building for that purpose a dam and ditch upon and through the plaintiff's land. The plaintiff owns a tract extending on both sides of the river for about fourteen and one-half miles and reaching back from the river for a mile and one-eighth on each side. It derives its title from a grant of the State of Sonora in 1833, confirmed by a decree of the Court of Private Land Claims on February 14, 1899, and a patent from the United States in pursuance of the decree, dated December 14, 1900. By reason of disputes before the date of the patent and wrongful disputes since, the plaintiff has not made actual use of all the waters of the river, although they are not sufficient to irrigate all the plaintiff's land that admits of irrigation. It has constructed no dams, canals or the like, and has not taken the water except for watering stock and other similar uses of

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it in its natural flow. The defendants threaten and intend to build a dam, as alleged, in place of one built in 1903, but washed out, and to build and rebuild a ditch through land of the plaintiff to another ditch already established, and to divert the water through the same to land of theirs on the north. They set up no title except that they have been the first to appropriate the water. The plaintiff claims as riparian owner, and argues that as such it has a right that cannot be taken from it by simple appropriation. The territorial court of first instance and the Supreme Court dismissed the bill, 89 Pac. Rep. 504, and the plaintiff appealed to this court.

It is not denied that what is called the common law doctrine of riparian water rights does not obtain in Arizona at the present day, Rev. Stats. Arizona, 1887, § 3198, but the plaintiff contends that it had acquired such rights before that statutory declaration, and that it cannot be deprived of them now. So far as the claim is rested on the original grant and the Mexican law it may be disposed of in a few words, without going into all the questions that would have to be answered before an opposite conclusion could be reached. "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that in the State of Sonora the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this Territory irrigation was practiced in the Santa Cruz Valley prior to the cession and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom." This is the statement of the territorial court, and we know nothing to control it. It is not met by arguments as to the general character of Mexican law, or by inference from the situation and nature of the grant. The same doctrine seems to be implied by the Howell Code, ch. 55, § 25, which we shall refer to again.

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The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title but releases that of the United States, *Beard* v. *Federy*, 3 Wall. 478, 491, and that by the grant from the United States it gained rights as a riparian proprietor that could not be displaced by a subsequent attempt to appropriate the water. *Sturr* v. *Beck*, 133 U. S. 541. But while it is true that in *Beard* v. *Federy*, *sup.*, Mr. Justice Field calls such a patent a quit-claim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power makes it good and valid: so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by force of such words that are foreign to the business of confirmation." Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be issued, says that it shall be issued "to the confirmee." Act of March 3, 1891, c. 539, § 10, 26 Stat. 854, 859. It would be possible, perhaps, to argue to the contrary from provisions in §§ 8 and 13, that the confirmation shall only work a release of title by the United States, but we are satisfied that the true intent of the statute and the reason of the thing are as we have said.

The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions patented after the act of March 3, 1877, c. 107, 19 Stat. 377, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act construed with Rev. Stat., § 2339. The Supreme Court of Oregon has rendered a decision to that effect on plausible grounds. *Hough* v. *Porter*, 98 Pac. Rep. 1083. See further, act of March 3, 1891, c. 561, § 18, 26 Stat.

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1101. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 704–706; *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 553. So it is unnecessary to consider how far, if at all, the defendants represent an appropriation of the water before the patent was granted. For that reason we have not set forth the details found by the court below as to the dams, ditches and use of water, going back to 1877.

But, perhaps, the main contention of the plaintiff is based on the legislation of the Territory, and especially on the Howell Code of 1864, c. 61, § 7, as follows: "The common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and laws of the United States, or the bill of rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all the courts of this Territory." We assume that this section, however it may affect the case at bar, was within the power of the legislature to enact. *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 702, 703; *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 553. Act of June 17, 1902, c. 1093, § 8. 32 Stat. 388, 390. But we agree with the territorial court that, construed with the rest of the code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames.

In the first place, this is merely the adoption of a general system as against another general system (the Spanish Mexican), that had been in force and that was repealed by § 1. If there were nothing more in the code, it would be going a great way to say that such a broad phrase forbade the courts to hold that the common law was adaptible and established the English rule of riparian rights only for English conditions, as suggested by Nave, J., below. It might be argued, with force, that an amendment, inserting the words "So far only as is consistent with and adapted to the natural and physical condition of the Territory, and the necessities of the people thereof," merely expressed what was implied before. Rev. Stats. 1887, § 2935. And the like might be urged with regard to § 3198 of the Re-

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vised Statutes of 1887, which, in terms, enacted or declared that "the common law doctrine of riparian water rights" should not obtain. But we are not left to rely upon reasonable implications and argument, for other parts of the original code are express upon the point. Therefore we need not consider whether, in any event, the statute could be supposed to confer property rights not previously possessed and not subject to legislative change. Compare *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387, and *Damon* v. *Hawaii*, 194 U. S. 154, 160.

By the statutory bill of rights, Art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall have the right to appropriate them exclusively, except under such equitable regulations as the legislature shall provide. And then chapter 55 "Of Acequias or Irrigating Canals," after again declaring streams of running water public, § 1, enacts that "All the inhabitants of this Territory who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water." § 3. By § 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. § 4. Preference is given to irrigation over other uses. § 5. By § 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken for mining. By § 17 precedence is given in time of scarcity to the oldest titles, and by § 25 "The regulation of acequias, which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used up to this day," and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and

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the qualifications imposed upon it, were correct. They simply follow what has been understood to be the law for many years. *Clough* v. *Wing*, 2 Arizona, 371.

The right to use water is not confined to riparian proprietors. *Gutierres* v. *Albuquerque Land and Irrigation Co.*, 188 U. S. 545, 556; *Coffin* v. *Left Hand Ditch Co.*, 6 Colorado, 443, 449, 450; *Willey* v. *Decker*, 73 Pac. Rep. 210, 220. Such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land. Whether there are any limits of distance is a question not arising in this case.

A final objection urged is that the plaintiff's land is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed if he desires by ch. 55, § 4 (now Rev. Stat., § 3202), as we have mentioned. We think that it would be unjust to disturb the decree on this ground, although in other circumstances the objection might be grave.

*Decree affirmed.*

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## AMERICAN BANANA COMPANY *v.* UNITED FRUIT COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 686. Argued April 12, 13, 1909.—Decided April 26, 1909.

While a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.

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Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts; but the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts.

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation.

The prohibitions of the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States.

Sovereignty means that the decree of the sovereign makes law; and foreign courts cannot condemn the influences persuading the sovereign to make the decree. *Rafael* v. *Verelst*, 2 Wm. Bl. 983, 1055, distinguished.

Acts of soldiers and officials of a foreign government must be taken to have been done by its order.

A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law.

166 Fed. Rep. 261, affirmed.

THE facts are stated in the opinion.

*Mr. Everett P. Wheeler*, with whom *Mr. Horace E. Deming* was on the brief, for plaintiff in error:

The Circuit Court should have taken jurisdiction of this action. Section 7 of the Sherman Act expressly provides for the bringing of suits like the present one, "in any Circuit Court of the United States in the district in which the defendant resides or is found." See also § 2, Art. VI, Const. U. S. The suit at bar is a civil suit, arising under the laws of the United States and a treaty made under its authority. It is brought to recover for injuries done by defendant, and declared unlawful by the Sherman Act. The Circuit Court is a court of the United States and is bound to administer the jurisdiction conferred upon it.

No considerations of public policy or comity forbid the courts of the United States to exercise jurisdiction and decide this controversy on the merits.

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The acts complained of were done in violation of an express statute of the United States. Costa Rica cannot give immunity to defendant for this offense, nor can exceptions be read into the Sherman Act not expressed in the act itself. *United States* v. *Union Pacific*, 91 U. S. 72, 91; *French* v. *Spencer*, 21 How. 238; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129, 142; *S. P. Chamberlain* v. *The Western Transportation Co.*, 44 N. Y. 305, 309; *Bank of Republic* v. *City of St. Joseph*, 21 Blatch. 436, 439.

Whatever value the principles of comity may have, they cannot be extended so far as to cloak a violation of the laws of the nation whose comity is appealed to. *The Santissima Trinidad*, 7 Wheat. 283, 354; *The Bello Corrunes*, 6 Wheat. 152, 169; *The Marianna Flora*, 11 Wheat. 1; *The Merino*, 9 Wheat. 391, 405; *La Jeune Eugenie*, 2 Mason, 409; *Underhill* v. *Hernandez*, 65 Fed. Rep. 577, affirmed 168 U. S. 250, discussed as not being in point. See also *People* v. *McLeod*, 25 Wend. 483.

The courts of this country can consider and collaterally pass upon the legality of acts of a foreign nation, in a suit between its own citizens. *Vasse* v. *Ball*, 2 Dall. 270, 275; 3 Kent's Comm. 303, 304; *The Santissima Trinidad*, 7 Wheat. 283, 351, 354; *The Estrella*, 4 Wheat. 298; *Angle* v. *Chicago, St. Paul &c. R. Co.*, 151 U. S. 119.

The extent of the rule is that a court cannot sit in judgment on the act of a foreign power where that act is directly drawn in question in a suit directly against such foreign power, or against an officer acting within its territory under its commands. *Nabob of Arcot* v. *East India Co.*, 4 Brown Ch. 131 (180); *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1 (affirmed 2 H. of L. 1); *Hatch* v. *Baez*, 7 Hun, 596; *Rafael* v. *Verelst*, 2 Wm. Blackstone, 1055.

The supposed government authority under which the act is done is in itself invalid. The Costa Rican officers, in destroying plaintiffs' property and business, were acting outside the territory of Costa Rica, and were making an usurping inroad on the territory of an adjoining friendly power. 1 Kent's Comm. 120. In considering the defense that an act was done under authority

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of government, the courts have uniformly held that such authority must be valid or lawful. Suit against an officer for an unlawful act is not a suit against his sovereign. *Poindexter* v. *Greenhow*, 114 U. S. 270, 290; *Osborn* v. *The Bank*, 9 Wheat. 738; *Ex parte Young*, 209 U. S. 123, 159; *Litchfield* v. *Bond*, 186 N. Y. 66; *People* v. *McLeod*, 25 Wend. 483.

An injury to the private property of a citizen by an officer of government is justiciable in the courts of the country of which he is a citizen, even if it be an act of state. *Baird* v. *Walker*, L. R. (1892) App. Cas. 491, overruling upon this point, *Buron* v. *Denman*, 2 Ex. 167, if susceptible of the interpretation put upon it by the District Judges. That case, however, is an authority for plaintiff; and see *Feather* v. *The Queen*, 6 Best & Smith, 257, 296. See also *Little* v. *Barreme*, 2 Cranch, 170, 179; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Entick* v. *Harrington*, 19 State Trials, 1043; *Money* v. *Leach*, 3 Burr. 1742, 1762.

It is never a defense, even to an officer who has committed a tort, that he has acted on behalf of his government under circumstances like those in this case. *A fortiori* it can be no defense to the citizens of the country against whose laws the tort was committed that it was done through the agency of such officer. *Duke of Brunswick's Case*, 2 H. of L. 1; *Musgrave* v. *Pulido*, L. R. 5 App. Cas. 102, 112; 1 Goodnow, Comparative Administrative Law, 35, 36; *Moodaly* v. *Moreton & East India Co.*, 2 Dickens, 652.

Damage sustained by the plaintiff was inflicted in pursuance of defendant's illegal combination, and is therefore actionable under the statute. *United States* v. *Patterson*, 55 Fed. Rep. 605; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423.

Defendant cannot complain because it alone is sued. Any member of such combination is liable for the acts of the combination, or any member of it, done in furtherance thereof. *Atlanta* v. *Chattanooga Foundry Co.*, 127 Fed. Rep. 23; *Chicago Coal Co.* v. *People*, 214 Illinois, 421, 453.

Acts done in pursuance of a combination are none the less done in pursuance thereof because done by only one member.

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*United States* v. *Standard Oil Co.*, 152 Fed. Rep. 290; *Tobacco Trust Case*, 149 Fed. Rep. 823; Cooley on Torts (3d ed.), 213.

The statute applies to acts done in a foreign country. The objection that the acts complained of were done abroad is entitled to no weight. The parties to the suit are American citizens. The commerce restrained by defendant's acts was foreign commerce of the United States. Congress has full power to legislate in respect to that and has exercised the power in this statute. *Gibbons* v. *Ogden*, 9 Wheat. 1; *United States* v. *Knight*, 156 U. S. 1.

Acts done abroad by citizens of the United States are subject to its jurisdiction and legislative powers.

The commerce of the United States may by its statutes be protected from injury by acts done beyond its boundaries. Both of these powers have been frequently exercised and their validity is established in both criminal and civil cases. *United States* v. *Gordon*, 5 Blatch. 18; *The Slavers* (*Kate*), 2 Wall. 350; *United States* v. *Pirates*, 5 Wheat. 184; *United States* v. *Rauscher*, 119 U. S. 407, 433; *Carib Prince*, 170 U. S. 655; *The Silvia*, 171 U. S. 462; *The Chattahoochee*, 173 U. S. 540.

The language of the Sherman Act is as comprehensive as that of the Harter Act. It is a rule prescribed by Congress for interstate and international commerce. It guards such commerce against acts which threaten it, no matter where they are done, and more especially if they are done by citizens of the United States. *Northern Securities Case*, 193 U. S. 337; *Thomsen* v. *Union Castle Co.*, 166 Fed. Rep. 251.

This court has uniformly held in suits against common carriers that it would, in determining the validity of contracts made with them, or their liability for torts committed by them, apply the American and not the foreign law; and enforce the policy of American law. *Liverpool & G. W. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

A State has the right to attach whatever consequences it chooses within its own territory to acts of its subjects wherever

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those acts may be done. Hall on Int. Law (5th ed.), 202; 1 Oppenheim, Int. Law, 195; Wharton, Crim. Law, § 271.

*Mr. Henry W. Taft* and *Mr. Moorfield Storey*, with whom *Mr. Walker B. Spencer* and *Mr. J. L. Thorndike* were on the brief, for defendant in error:

The plaintiff cannot recover for any injury caused to its property or business by the acts of Costa Rica.

The allegations of the complaint make it clear that the plantation, railroad and goods of the plaintiff were seized by the officers and soldiers of Costa Rica, and that their action in making this seizure has been approved and possession of the seized property has since been retained by the government of that state acting in the exercise of its *de facto* sovereignty over the territory in which the seizure was made.

The acts complained of were the acts of Costa Rica, and the damage claimed was caused by those acts. Whether they were originally ordered or only approved and ratified is immaterial. *Buron* v. *Denman*, 2 Exch. 167; *Underhill* v. *Hernandez*, 168 U. S. 250, 252; Webb's Pollock on Torts, pp. 132, 137.

The status and territorial jurisdiction of foreign states, their rights, powers and obligations, the rights and obligations of a citizen of the United States arising out of relations with a foreign government, and, conversely, the rights and obligations of a foreign state in dealing with a citizen of the United States, are necessarily political questions, which, under the Constitution of this government, are confided exclusively to the executive branch of the government, and with them the judicial branch has no concern. *Kennett* v. *Chambers*, 14 How. 38, 51; *Williams* v. *Suffolk Insurance Co.*, 13 Peters, 415; *United States* v. *Holliday*, 3 Wall. 419; *Duke of Brunswick* v. *King of Hanover*, 2 H. L. C. 1 (same case below, 6 Beavan, 1; 13 L. J. Ch. 107); *Secretary of State* v. *Kamachee*, 13 Moore, Privy Council, 22 (same case, English Reports Reprint, Vol. 15, p. 9); *Buron* v. *Denman* (1848), 2 Ex. 167; *Feather* v. *Queen* (1865), 6 B. & S. 257; *Doss* v. *Secretary of State*, 19 Equity, 509.

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In this case the *de facto* sovereignty of Costa Rica is recognized by the State Department, and this recognition establishes the fact conclusively in the courts of the United States. It is immaterial whether Costa Rica had jurisdiction and sovereignty over this territory in dispute, or whether its attempt to exercise such jurisdiction was by legal right or was an act of war or aggression against the Republic of Panama. *Underhill* v. *Hernandez*, 168 U. S. at p. 252.

Redress for injuries caused to a citizen of a foreign nation by another nation through the exercise of *de facto* powers, even though maintained by means of force alone, cannot be had in the ordinary municipal courts of another nation, nor even in the courts of the offending nation without its consent. It can only be had in the forum of international relations.

The acts are alleged to have been done entirely in a foreign country, with which the Sherman Act has nothing to do.

The alleged acts of the defendant in inducing the acts of Costa Rica had no direct or indirect relation to commerce between Panama and the United States. They were acts committed in Costa Rica. Their tortious character does not alter the fact that their direct effect was on production and not on trade. The direct effect of the defendant's acts was to injure production only. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *In re Greene*, 52 Fed. Rep. 104; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. Rep. 623; *Coe* v. *Errol*, 116 U. S. 517; *Kidd* v. *Pearson*, 128 U. S. 1; *Dudley* v. *Briggs*, 141 Massachusetts, 582.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, § 7. 26 Stat. 209, 210. The Circuit Court dismissed the complaint upon motion, as not setting forth a cause of action. 160 Fed. Rep. 184. This judgment was affirmed by the Circuit Court of Appeals, 166 Fed. Rep. 261, and the case then was brought to this court by writ of error.



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The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation

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of the plantation and railway. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employés and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that, even if the main argument fails and the defendant is held not to be answerable for acts depending on the coöperation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as

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adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton*, 207 U. S. 398, 403; *Hart* v. *Gumpach*, L. R. 4 P. C. 439, 463, 464; *British South Africa Co.* v. *Companhia de Moçambique* [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., § 5335. See further *Commonwealth* v. *Macloon*, 101 Massachusetts, 1; *The Sussex Peerage*, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex* v. *Sawyer*, 2 C. & K. 101; *The Zollverein*, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken* v. *Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips* v. *Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, Conflict of Laws (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of

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the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." *Ex parte Blain, In re Sawers*, 12 Ch. Div. 522, 528; *State* v. *Carter*, 27 N. J. (3 Dutcher) 499; *People* v. *Merrill*, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbabilty of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be

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complained of elsewhere in the courts. *Underhill* v. *Hernandez*, 168 U. S. 250. The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact. The fact has been recognized by the United States, and by the implications of the bill is assented to by Panama.

The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a non-conductor and to bar responsibility, *Allen* v. *Flood* [1898], A. C. 1, 121, 151, etc., but it is not clear that this is always true, for instance, in the case of the privileged repetition of a slander, *Elmer* v. *Fessenden*, 151 Massachusetts, 359, 362, 363, or the malicious and unjustified persuasion to discharge from employment. *Moran* v. *Dunphy*, 177 Massachusetts, 485, 487. The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353. In the case of private persons it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain persuasions addressed to them are wrong. See *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, 16–21; *Fletcher* v. *Peck*, 6 Cranch, 87, 130, 131.

The plaintiff relied a good deal on *Rafael* v. *Verelst*, 2 Wm. Bl. 983; *Ib.* 1055. But in that case, although the Nabob who imprisoned the plaintiff was called a sovereign for certain purposes, he was found to be the mere tool of the defendant, an English Governor. That hardly could be listened to concerning a really independent state. But of course it is not alleged

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that Costa Rica stands in that relation to the United Fruit Company.

The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them; *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45, 52; *The Paquete Habana*, 189 U. S. 453, 465; *Dempsey* v. *Chambers*, 154 Massachusetts, 330, 332. The injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it and to indicate our general point of view.

*Judgment affirmed.*

MR. JUSTICE HARLAN concurs in the result.

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# SAND FILTRATION CORPORATION OF AMERICA *v.* COWARDIN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 123. Argued April 6, 1909.—Decided April 26, 1909.

In the absence of a clear showing of its incorrectness this court accepts the finding of the lower courts.

The object of construction of a contract is to effectuate the intention of the parties in making it; and it should be interpreted in the light of the circumstances surrounding the parties at the time when it was made.

Although contracts relating to the same subject may be dated the same day they need not be construed together as one instrument if all the parties to both are not in privity.

An agreement to pay a sum out of profits of a contract *held*, in this case, not to depend on whether profits were or were not realized by a subcontractor but only on whether such profits were realized by the party making the contract.

29 App. D. C. 571, affirmed.

THE facts are stated in the opinion.

*Mr. A. S. Worthington*, with whom *Mr. Charles L. Frailey* was on the brief, for appellant.

*Mr. Charles Cowles Tucker* and *Mr. Reginald S. Huidekoper*, with whom *Mr. J. Miller Kenyon* was on the brief, for appellees May and Jekyll.

*Mr. J. J. Darlington* filed a brief in behalf of appellees Cowardin, Bradley, Clay and Stagg.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents a question as to the proper construction of a certain contract. It arises as follows: Cowardin, Bradley, Clay

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& Company, hereinafter called the Cowardin Company, had a contract with the Government of the United States for the construction of a filtration plant in the city of Washington. In the partial performance of the contract they had expended about $1,300 in money and had contracted debts somewhat in excess of $14,000. Afterwards, on May 26, 1903, the Cowardin Company sublet the contract to the appellees May and Jekyll. By this contract May and Jekyll agreed to reimburse the Cowardin Company for their expenditures; to pay the liabilities incurred by them, and to complete the work for 90 per cent of the contract price, permitting the Cowardin Company to have 10 per cent thereof as its profit. And further, May and Jekyll agreed to lend the Cowardin Company $10,000, and to furnish $50,000 for the purchase of a plant for doing the work. On August 25, 1903, May and Jekyll made a new contract with the Cowardin Company, surrendering their subcontract, executed a bill of sale to the Cowardin Company of the plant by which the work was being done, and as to the debts which May and Jekyll had contracted the Cowardin Company agreed to assume the same, and to procure the assumption thereof by any one who might undertake to complete the contract. The plant, including that purchased with the $50,000, was to be transferred to the Cowardin Company, and all the property to be conveyed in trust to certain trustees to secure the payment of the debts of May and Jekyll. As to the $10,000 advanced by May and Jekyll under the contract of May 26, 1903, of which $8,000 remained unpaid, the following stipulation was made:

"Inasmuch as the parties of the second part [May and Jekyll] have heretofore advanced to the parties of the first part [Cowardin Company] the sum of $10,000 under the eighth paragraph of said contract of May 26, 1903, and there now remains due to the said parties hereto of the second part $8,000 thereof, $2,000 having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of $8,000 out of the net profits which may be realized by the parties of the first part

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from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said $8,000, if the same shall not be sooner voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the 10% of the contract price for said work which will be reserved by the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States, but shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part appropriate provision shall be made for the reservation and payment of said $8,000 to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the $8,000 shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subject to the payment of the said $8,000, or so much thereof as said profit will pay and satisfy."

On the same day, August 25, 1903, the Cowardin Company made a contract with one Dean, whereby, in consideration of the sale to Dean and Shibley, afterwards the Sand Filtration Corporation of America, appellant in this case, of the filtration plant and of the employment of appellant by a receiver to be appointed, to complete the work, Dean agreed to pay to the receiver $65,000 in instalments; to complete the work, and further "to comply with the provisions and conditions of one certain agreement entered into between the grantors (Cowardin Company) and May and Jekyll, a copy of which is hereto attached and to be read as a part thereof, including, among other provisions, the payment of the sum of $8,000 to the said May and Jekyll, as in the said agreement is provided, and the payment of which is also assumed by the said grantee (Dean)."

As under the law the Cowardin Company could not assign the contract with the Government, and as the company was in

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financial difficulties, it was agreed that the receiver to be appointed for the Cowardin Company should enter into a contract with the Sand Filtration Corporation, successor of Dean, for the carrying out of the provisions of the contract of August 25, 1903, with the Cowardin Company. A receiver was appointed and a contract made, and on August 27th a further contract was entered into, whereby it was agreed that the receiver was to deduct from the money to be paid by the Government, as the work progressed, the sum of $65,000, and also the sum of $8,000 therein mentioned, and to pay the same directly to the Cowardin Company instead of paying it to Dean, and then receiving it back from him.

The Sand Filtration Corporation of America, successor to Dean, completed the work, and, as the record shows, at a loss of $100,000 or more. Pleadings were framed and issues made up, presenting to the court the question whether the receiver should be ordered to pay the sum of $8,000 to the Sand Filtration Corporation of America, appellant, or to May and Jekyll, under the contracts hereinbefore set forth. Upon hearing in the Supreme Court of the District of Columbia the court directed that this sum be paid by the receiver to May and Jekyll. From this decree the Sand Filtration Corporation of America appealed to the Court of Appeals of the District of Columbia, and that court affirmed the decree of the Supreme Court of the District. 29 App. D. C. 571. The case was then appealed here.

As we have said, the single question in this case is whether, under the facts recited, this $8,000 should go to the appellant as successor to Dean, or to May and Jekyll, as the courts below have held. It is insisted for appellant that the proper construction of the contract required payment of the $8,000 to May and Jekyll only upon the contingency that a profit should be realized under the construction contract with the United States, that is to say, if the construction of the filtration plant proved to be a profitable job then May and Jekyll were to be paid $8,000, or so much thereof as the profits would pay. The record discloses that appellant, successor of Dean, not only

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made no profits, but on the contrary lost a large sum of money.

Upon the pleadings and testimony the lower courts have found, and we accept the finding in the absence of a clear showing of its incorrectness, that, without doing the work, the Cowardin Company has made out of the contract a sum in excess of $8,000 paid from the sums coming from the United States on account of the contract, in manner aforesaid.

The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. It is contended by the learned counsel for the appellant that the agreements of August 25, 1903, were cotemporaneous, and must be construed together as one agreement, and that the effect of such construction is to require the payment of $8,000 to May and Jekyll only in the event that the contract should prove profitable, and as no profit was realized from the construction nothing is to be paid. But while these contracts were dated the same day, whether they were executed at the same time or not does not appear, and certainly Dean was not in privity with May and Jekyll. The $8,000 was to be paid out of moneys reserved coming from the Government, and upon the contingency that a profit should be realized by the Cowardin Company. There was no agreement that the payment of this sum should be upon the contingency that any sub-contractor, such as Dean and his successor, should make a profit out of the contract. If such was the intention of the parties it is not so written in the contract. May and Jekyll were to have the money advanced by them repaid if "the party of the first part," the Cowardin Company, "shall realize a profit, under said contract." It is clear that the Cowardin Company did make a profit, and we are unable to see that it makes any difference that it was realized in the manner we have detailed, rather than from the construction of the work. The substance of the agreement between the Cowardin Company and May

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and Jekyll looked to the repayment of the money advanced in case the Cowardin Company realized a profit. This it has done, and we think the conditions of the contract have been kept.

It is suggested by the learned counsel for the plaintiff in error that as the profit of $65,000 was realized by the Cowardin Company by the agreements of August 25, 1903, and as they were cotemporaneous, the agreement for payment of the $8,000 only in the contingency of profit cannot mean the $65,000 so realized by the execution of the papers, but had reference to future profits in doing the work.

But it is to be noted that the Cowardin Company was the only party contracting with the United States, and had Dean thrown up the contract or failed to complete the construction of the work the Cowardin Company would still have been held on their contract and bond. Until Dean or his successor completed the work the Cowardin Company was not absolved from liability so far as the Government was concerned, and it could not be known whether a profit would be made or not.

As the Cowardin Company did realize such profit as required the payment of the $8,000 to May and Jekyll by the receiver out of the sums received from the Government, the courts below were right in so ordering.

The judgment of the Court of Appeals of the District of Columbia is affirmed.

*Affirmed.*

Dissenting: MR. JUSTICE MCKENNA and MR. JUSTICE MOODY.

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THE UNITED STATES *ex rel.* THE ATTORNEY GENERAL OF THE UNITED STATES *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570. Argued January 19, 20, 1909.—Decided May 3, 1909.

Although a limitation to its operation might be reasonable and thus assuage the radical results of a prohibitory statute, if it is not expressed in the statute, to engraft such a limitation would be pure

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judicial legislation. In construing the commodities clause of the Hepburn Act the suggestion of the Government to limit its application to commodities while in the hands of a carrier or its first vendee, and, as thus construed, extend the indirect interest prohibition to commodities belonging to corporations the stock whereof is owned in whole or in part by the carrier, or those which had been mined, manufactured or produced by the carrier prior to the transportation, cannot be accepted.

The duty of this court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality (*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197) includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation.[1]

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[1] The grave constitutional questions which the court could not have avoided answering by adopting the construction contended for by the Government are as follows (see p. 406, *post*):

1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce.

2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.?

Also as necessarily involved in the determination of the foregoing questions:

*a*. Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as

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Where ambiguity exists it is the duty of a court construing a statute to restrain the wider and doubtful provisions so as to make them accord with the narrow and more reasonable provisions and thus harmonize the statute.

A prohibition in an act of Congress will not be extended to include a subject where the extension raises grave constitutional questions as to the power of Congress, where one branch of that body rejected an amendment specifically including such subject within the prohibition.

In the construction of a statute the power of the lawmaking body to enact it, and not the consequences resulting from the enactment is the criterion of constitutionality.

The provision contained in the Hepburn Act approved June 29, 1906, c. 3591, 34 Stat. 584, commonly called the commodities clause, does not prohibit a railway company from moving commodities in interstate commerce because the company has manufactured, mined or produced them, or owned them in whole or in part or has had an interest direct or indirect in them, wholly irrespective of the relation or connection of the carrier with the commodities at the time of transportation.

The provision of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of the ownership by the carrier of stock in such corporation provided the corporation has been organized in good faith.

Rejecting the construction placed by the Government upon the commodities clause, it is decided that that clause, when all its provisions are harmoniously construed, has solely for its object to prevent carriers engaged in interstate commerce from being associated in

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well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible?

*b.* Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

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interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions:

*a.* When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity;

*b.* When the railway company owns the commodity to be transported in whole or in part;

*c.* When the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation.

As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact. *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. The contention that the clause if applied to preëxisting rights will operate to take property of railroad companies and therefore violate the due process provision of the Fifth Amendment, having been based upon the assumption that the clause prohibited and restricted in accordance with the construction which the Government gave that clause, is not tenable as to the act as now construed which merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried.

The constitutional power of Congress to make regulations for interstate commerce is not limited by any requirement that the regulations should apply to all commodities alike, nor does an exception of one commodity from a general regulation of interstate commerce necessarily render a statute unconstitutional as discriminating between carriers; and the exception of timber in the commodities clause of the Hepburn Act does not render the act unconstitutional, nor can the question of the expediency of such an exception affect the question of power.

Where, as in this instance, the provision for penalties is separable from the provisions for regulations, the court will not consider the question of the constitutionality of the penalty provisions in a suit brought



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by the Government to enjoin carriers from violating the regulations and in which no penalties are sought to be recovered.

As the construction now given the act differs widely from the construction which the Government gave to the act and which it was the purpose of these suits to enforce, it is not necessary in reversing and remanding, to direct the character of decrees which shall be entered, but simply to reverse and remand the case with directions to enforce and apply the statute as it is now construed.

Although the Delaware and Hudson Company may originally have been chartered principally for mining purposes, as it is now engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, it is a railroad company within the purview of the commodities clause and is subject to the provisions of that clause as they are now construed.

164 Fed. Rep. 215, reversed.

THE facts which involve the constitutionality and construction of the commodities clause of the Hepburn Act, § 1, c. 3591, act of June 29, 1906, 34 Stat. 584, are stated in the opinion.[1]

*The Attorney General* and *The Solicitor General*, with whom *Mr L. Allison Wilmer* and *Mr. Thomas C. Spelling* were on the brief, for the United States:

The question of the reasonableness of a statute is for the legislature, but the clause in question is a reasonable exercise of the power of Congress.

If a statute pertains to a subject exclusively committed to Congress, the statute is within the scope of constitutional power; this statute is within the scope of power conferred by the Con-

[1] "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

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stitution. *The Lottery Case*, 188 U. S. 321, 357; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344; *The Daniel Ball*, 10 Wall. 557, 566.

Congressional non-action lends no color of authority or validity to state regulations of anything properly pertaining to interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 109, 110–122; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 216, 229, 232; *Crandall* v. *Nevada*, 6 Wall. 35, 48, 49; *Houston* v. *Moore*, 5 Wheat. 23; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386. When the Federal power has been exercised, it is, by the express terms of the Constitution, the exercise of the supreme will, and the state regulation must, in so far as there is a conflict, give way. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 199; *McCulloch* v. *Maryland*, 4 Wheat. 422; *Asbell* v. *Kansas*, 209 U. S. 251, 254; *Leisy* v. *Hardin*, 135 U. S. 100, 109; *Houston* v. *Moore*, 5 Wheat. 1, 23; *Brown* v. *Maryland*, 12 Pet. 446; *Groves* v. *Slaughter*, 15 Pet. 448, 510, 511; *New York* v. *Miln*, 11 Pet. 102, 157–159.

Not even a State, still less one of its artificial creations, can stand in the way of the enforcement of an act of Congress constitutionally passed under its authority to regulate commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 333; *McCulloch* v. *Maryland*, 4 Wheat. 427, 429, 432, 435; *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414.

Corporations created by the States are as much subordinate to the powers of Congress, in the regulation of interstate commerce, as if they had been created by acts of Congress. *Hale* v. *Henkel*, 201 U. S. 43, 75.

If a State can by the creation of a corporation and by conferring upon the corporation certain powers forestall the operation of subsequent Federal laws before their enactment, the provision in the Constitution that laws made pursuant to its provisions shall be the supreme law of the land, may be at any time nullified. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 272; *Railroad Co.* v. *Husen*, 95 U. S. 471.

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The prohibitions contained in this statute do not prevent its constituting legislation which Congress may enact under the commerce clause of the Constitution.

Congressional power over commerce among the States is analogous to the same power over foreign commerce. *Crutcher* v. *Kentucky*, 141 U. S. 57; *Brown* v. *Houston*, 114 U. S. 622, 630; *Gibbons* v. *Ogden*, 9 Wheat. 1, 192.

The recognized powers as to foreign commerce, such as laying an embargo as to products of other nations in a time of peace, and the power to forbid and punish introductions of coins of foreign nations, illustrate Congressional power to forbid transportation of commodities from State to State, under circumstances requiring such prohibition in the national interest. *United States* v. *Marigold*, 9 How. 560, 566.

Interstate railroads are peculiarly subject to regulation, by reason of their performance of public functions and duties. They are vested with public rights to enable them to serve public interests as common carriers, and Congress has the power to divorce their public duties as such public servants from their private interest in carrying their own products. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361; *Cherokee Nation* v. *South Kansas R. R. Co.*, 135 U. S. 657.

The question of the reasonableness or of the wisdom of the enactment is not for the courts but for the legislature. *Silz* v. *Hesterberg*, 211 U. S. 31, 40; *State* v. *Hyman*, 98 Maryland, 618, 619; *City of Baltimore* v. *Radecke*, 49 Maryland, 217, 229, 230.

Arguments *ab inconvenienti* are not to be considered unless the language of the act be ambiguous. *Ex parte Kearney*, 7 Wheat. 38, 44; *Beardstown* v. *Virginia*, 76 Illinois, 34; *Greencastle* v. *Black*, 5 Indiana, 557; *Smith* v. *Thursby*, 28 Maryland, 244; *Henshaw* v. *Foster*, 9 Pick. (Mass.) 312, 316; *Gage* v. *Currier*, 4 Pick. (Mass.) 399.

The courts are not at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in its words. Cooley,

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Const. Lim. (5th ed.) 205; *People* v. *Fisher*, 24 Wend. 215, 220; *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *People* v. *Rucker*, 5 Colorado, 455; *Commonwealth* v. *McCloskey*, 2 Rawle, 374.

The presumption is in favor of validity, and only when the question is free from reasonable doubt will the Supreme Court hold an act of Congress to be in violation of the Constitution. *Nicol* v. *Ames*, 173 U. S. 509; *Fletcher* v. *Peck*, 6 Cranch, 126.

For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature. *Covington Bridge Case*, 105 U. S. 470, 482; *The Lottery Case*, 188 U. S. 321; *Joint Traffic Association Case*, 171 U. S. 505, 573; *Northern Securities Case*, 193 U. S. 337; *Beebe* v. *State*, 6 Indiana, 501, 528; *Johnston* v. *Commonwealth*, 1 Bibb, 603; *Flint River Steamboat Co.* v. *Foster*, 5 Georgia, 194; *State* v. *Kruttschnitt*, 4 Nevada, 178; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *Hills* v. *Chicago*, 60 Illinois, 86; *Ballentine* v. *Mayor &c.*, 15 Lea, 633; *State* v. *Traders' Bank*, 6 So. Rep. 582.

If power exists, it is to be assumed that legislative discretion has been properly exercised. Cooley, Const. Lim. (6th ed.,) 220; *People* v. *Lawrence*, 36 Barb. 177; *People* v. *N. Y. Cent. R. Co.*, 34 Barb. 123; *Baltimore* v. *State*, 15 Maryland, 376; *Goddin* v. *Crump*, 8 Leigh, 154; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The prevention of monopoly has long been a legitimate object of legislation. *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 676; *Northern Securities Case*, 193 U. S. 341. Far stronger reasons, referable to a well-founded fear of monopoly, exist for prevention of a union of ordinary occupations, such as trading and producing, with transportation, by railroad corporations, than can be urged against consolidations such as were forbidden in the *Northern Securities Case*.

The term "commerce," as used in the Constitution, embraces the instrumentalities by which commerce is carried on.

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*Northern Securities Co.* v. *United States*, 193 U. S. 197; *Railroad Co.* v. *Fuller*, 17 Wall. 500, 508; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. When a railroad is engaged, as are the roads owned by the defendants, in interstate commerce, it is necessarily an instrumentality of interstate commerce. When, therefore, they entered into such combinations as are shown in this case, such restrictive arrangements gave them the essential character of contracts, combinations, or conspiracies in restraint of trade or commerce, whereby the defendants monopolized, or attempted to monopolize, trade or commerce among the several States or with foreign nations. *Coxe Brothers & Co.* v. *Lehigh Valley Railroad Co.*, 4 I. C. C. Rep. 468; *New Haven R. R.* v. *I. C. C.*, 200 U. S. 392, 393; *United States* v. *Freight Association*, 166 U. S. 290, 333, 334; *Joint Traffic Association Case*, 171 U. S. 577; *Addyston Pipe Case*, 175 U. S. 211, 244.

The highways of commerce are, in a sense, the public property of the Nation and subject to all the requisite legislation by Congress, which necessarily includes the power to keep them open and free from any obstruction, and Congress has, in this regard, all the powers that existed in the States before the adoption of the Constitution. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *In re Debs*, 158 U. S. 564, 586.

These combinations between state corporations, one or more being industrial and the other a common carrier, would be amenable to a state law formulated in like terms as the Anti-Trust Act. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 294; *People* v. *North Riv. Sug. Ref. Co.*, 54 Hun (N. Y.), 377. And if such combinations interfere with the laws of free competition in interstate commerce, and cannot be effectively dealt with under the anti-trust act, Congress can provide another and more effective remedy. *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *McCulloch* v. *Maryland*, 4 Wheat. 315; *United States* v. *Fisher*, 2 Cranch, 358, 396; *Juilliard* v. *Greenman*, 110 U. S. 440, 441; *In re Jackson*, 14 Blatch. 250.

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The law here in question does not violate the guarantees of the Fifth Amendment, nor any other constitutional guarantees. The prohibition of the so-called commodities clause is not arbitrary as that word is defined in the decisions of this and other courts. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 155; *A., T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; *Clark* v. *Kansas City*, 178 U. S. 114; *Tullis* v. *Lake Erie & Western R. R.*, 175 U. S. 348; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

It cannot be said that this statute is on its face a deprivation of life, liberty or property without due process of law, in the sense in which the phrase is ordinarily used. It is as proper an exercise of power under the commerce clause to forbid, conditionally, shipments of a certain class or description as to forbid discrimination. See *Joint Traffic Association Case*, 171 U. S. 571; *Addyston Pipe Case*, 175 U. S. 211. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. *People* v. *Fisher*, 24 Wend. 215, 220. To the same effect are *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *State* v. *Smith*, 44 Ohio St. 348; *People* v. *Rucker*, 5 Colorado, 455; *Whallon* v. *Ingham*, 51 Michigan, 503; *Wooten* v. *State*, 5 So. Rep. 39; *Cochran* v. *Van Surlay*, 20 Wend. 365, 381, 383; *People* v. *Gallagher*, 4 Michigan, 244; *Benson* v. *Mayor &c.*, 24 Barb. 248; *Grant* v. *Courter*, 24 Barb. 232.

The clause does not violate the provision that no person shall be deprived of property without due process of law. When it is claimed that a legislative act is inhibited by the due process clause, as applied to property, there must be an interest amounting to a vested right of property. If a right claimed is not of that character, then it is merely an inchoate right—a privilege. Rights are vested when the right to enjoyment, present or prospective, has become the property of

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some particular person or persons, as a present interest. 8 Cyc. L. & Proc., 894; Cooley, Const. Lim. 438, 465; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 673. No right can be vested as a result of action which invades the domain of congressional power to regulate commerce, whether Congress has already acted or yet withholds action on the subject. Cooley, Const. Lim. (6th ed.) 437, 438; *Fitzgerald* v. *Grand Trunk R. R. Co.*, 63 Vermont, 169; *S. C.*, 13 L. R. A. 70; *Union Bridge Case*, 204 U. S. 364.

Retrospective Federal laws, unless *ex post facto*, are not within the due process clause or any other prohibition of the Constitution, however repugnant to the principles of sound legislation. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Satterlee* v. *Mathewson*, 2 Pet. 380; *Bonaparte* v. *Camden*, Baldw. 205; *S. C.*, Fed. Cas. No. 1617; *Bennett* v. *Baggs*, Baldw. 60; *S. C.*, Fed. Cas. No. 1319; *Albee* v. *May*, 2 Paine, 74; *S. C.*, Fed. Cas. No. 134.

No valid argument can be based upon long acquiescence in the use made of their coal lands and their output by the railroads on the part of the United States; for no estoppel can be asserted against constitutional legislation. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, 689; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Bridge Company* v. *United States*, 105 U. S. 470.

Not only is the Government not barred by acquiescence in what the defendants have done, whether with or without state authority, but Congress could not have bartered away or estopped itself to exercise any of its constitutional powers. *Monongahela Nav. Co.* v. *Coons*, 6 W. & S. (Pa.) 101; *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. (Pa.) 9; *New York & Erie Railroad Co.* v. *Young*, 33 Pa. St. 175; *McKeen* v. *Delaware Canal Co.*, 49 Pa. St. 424; *Freeland* v. *Pennsylvania Railroad*, 66 Pa. St. 91; *Bailey* v. *Phil., Wilm. & Balt. Railroad*, 4 Harr. (Del.) 389; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 80.

The clause does not violate the provision that private prop-

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erty shall not be taken for public use without just compensation. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; Cooley, Const. Lim. (6th ed.) 473.

The commodities clause is not open to the objection that the penalties imposed for violations thereof are of such magnitude and so unduly excessive and extortionate as to be substantially destructive of the property and franchises of the carriers affected thereby, nor does it, in respect to such carriers, constitute a denial of the equal protection of the law. Cooley, Const. Lim. 402; *Coffey* v. *Harlan County*, 204 U. S. 659, 665.

The clause does not give a preference to the ports of one State over those of another, contrary to Art. I, § 9, clause 6 of the Constitution. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80; and see also *Pennsylvania* v. *Bridge Co.*, 18 How. 421, 435.

The clause does not deny full faith and credit to the public acts of a State contrary to Art. IV, § 1 of the Constitution.

This clause did not confer any power or jurisdiction upon the States, but merely assured the recognition of their acknowledged jurisdiction over persons and things within the respective territory of each of them. Story, Const., § 1313; *Bissell* v. *Briggs*, 9 Massachusetts, 462, 467; *Shunway* v. *Stillman*, 4 Cowen, 292; *Borden* v. *Fitch*, 15 Johns. 121; Story, Confl. of Laws, § 609; *McElmoyle* v. *Cohen*, 13 Pet. 312; *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165. The States of New York and Pennsylvania could no more diminish or increase or forestall Federal regulation of interstate commerce than they could bind the Nation by a treaty with a foreign government, or by a declaration of war against a friendly nation.

The clause does not deny persons any privileges or immunities of citizens of the States contrary to Art. IV, § 2, subd. 1, of the Constitution.

A corporation acquires by its charter no extraterritorial powers, immunities, or privileges, even if it were clear that this constitutional provision was intended to apply to corporations. In fact this constitutional provision has been always held a

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prohibition against state, and not against Federal, action, though there is nothing in this statute or in the record rendering the question relevant.

The clause does not invade the reserved rights of the people or of the States contrary to the Ninth and Tenth Amendments or any other provisions of the Constitution, nor does it deprive any person of any right of property or other right secured by § 2 of Art. IV, or by the Fifth, Eighth, Ninth, Tenth or Fourteenth Amendment, or by any other Amendment or provision of the Constitution.

This objection is yet another form of saying that the people have never conferred upon Congress the power to enact the commodities clause, or that it is not on its face a constitutional exercise of the power to regulate interstate commerce. It is only where Congressional power is claimed upon an inherent sovereignty theory, or under the general-welfare clause, that such an objection can be pertinent, as, for example, in a case like *Kansas* v. *Colorado*, 206 U. S. 46, where power was claimed for Congress to interpose in the distribution of the inland waters of a State for irrigation purposes.

No right not under protection of the prohibitions or guarantees of the Federal Constitution can be set up against an authorized regulation of interstate commerce, even though such right be given in terms by a state law. If the court finds constitutional authority for the commodities clause then no state charter can furnish to the defendant any protection or defense in an action brought for its enforcement.

No relations assumed by individuals, nor rules governing such relations *inter sese*, whether made by the individuals themselves or by a State, can stand in the way, where an issue arises between them and the Government, to prevent the enforcement of a constitutional law. The right of a State to create a corporation and vest it with certain powers does not carry with it the right to project either the powers of the State or of the corporation across state lines, and thus invade the domain of interstate commerce, which it is the sole province of Congress

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to regulate and protect. *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347, 357, 358.

Each State has plenary local powers over its own territory and its own corporations. But a State, while exercising state sovereignty over a corporation of its creation, cannot prevent or embarrass the exercise by Congress of any power intrusted to it by the Constitution. *Railroad Co.* v. *Maryland*, 21 Wall. 456, 473; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347. See also *Brown* v. *Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Lottery Case*, 188 U. S. 321; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The clause does not impair the obligation of contracts. Without going so far as to say that such obligations as are set forth in the answers are invalid, notwithstanding the authority and sanction of state laws, defendants will not be heard to set them up to defeat a Federal law, passed in the exercise of power constitutionally conferred. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 569, 571.

All the defendant companies have an "interest" in the coal transported, within the meaning of the word "interest" as used in the statute. The interest of the companies, or any one of them, may not be a legal interest, but it is none the less real and substantial. *Humphreys* v. *McKissock*, 140 U. S. 304, 312; *Burton* v. *United States*, 202 U. S. 344.

The exception in the statute of "timber and the manufactured products thereof" from the prohibition contained in the statute, does not render the statute unconstitutional. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, discussed, and distinguished from this phase of the case at bar.

The contention of the defendants that they have no interest, within the meaning of the clause in question, in the coal trans-

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ported by them which is mined and sold by the coal companies of which they own all, or a large part, or some part, of the capital stock, is wholly without force. The same is true of the assertion of the Delaware and Hudson Company that because of a sale of part of its coal at the mines, it is not the owner thereof when transportation begins, or at any time thereafter. Equally without merit is the contention of the Lackawanna Company that its ownership of capital stock of coal companies does not constitute an interest, direct or indirect, in the coal mined by such companies and transported over its lines of railroad.

The purpose to be attributed to Congress in enacting the statute, as well as the language of the statute itself, precludes the view that a legal interest only was referred to. The purpose of the statute, which was to be gathered from the history of the times and the conditions that were to be remedied, was to prevent discrimination on the part of railroads engaged in interstate commerce against the shippers of the country in the interest of themselves or persons or corporations under their control or in which they were interested. The idea of Congress was to free interstate transportation from the dangers arising from self-interest on the part of the carriers. The temptation to indulge in secret rebating in the transportation of coal in interstate commerce, and in other favoritism, is as great where the carrier owns a majority of the stock of a coal mining company as where it is itself directly engaged in the mining of coal. In the one case its interest in the coal is direct, in the other it is indirect, but in both cases its interest is substantially the same so far as the purpose which Congress may be presumed to have had in view is concerned. *Burton* v. *United States*, 202 U. S. 344.

A railroad company has an interest in a corporation or the property of a corporation whose stock it holds. It is true it is not such an interest as it can mortgage or assign (*Humphreys* v. *McKissock*, 140 U. S. 304, 312); it is not a legal interest, but it is none the less real and substantial. See *Pullman Car Co.* v.

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*Missouri Pacific Co.*, 115 U. S. 587, 597; 4 Words and Phrases Judicially Defined, 396 *et seq.*, and cases there cited.

As to the Delaware and Hudson's claim, it is argued on behalf of that company that the statute should be read as if the word "or" in the expression "any article or commodity other than timber and manufactured products thereof, manufactured, mined, or produced by it or under its authority, *or* which it may own in whole or in part," should be read as if it were "and," so that it would not apply to the transportation by a railroad company of coal mined by it, but the title to which had passed from it. Otherwise, it is argued, it would be impossible for a railroad company to transport any coal mined by it, although title to it may have passed through several purchasers. This amounts merely to saying that the statute, as drawn, is impolitic, but the statute is to be given a reasonable construction to accomplish the purpose of Congress in its enactment. The interest that a railroad might have in transporting for the vendee, at less than the published tariff rate, coal mined by it and sold at the mines, is apparent. But ordinarily it would have no such interest in respect to the transportation of such coal for any subsequent purchaser from its vendee. The latter case would not be within the spirit and purpose of the act, although it might come within its letter.

*Mr. John G. Johnson*, *Mr. Robert W. De Forest* and *Mr. Walker D. Hines* for defendants in error and appellees. (*Mr. Johnson* and *Mr. De Forest* for defendants in error and appellees generally, *Mr. Hines* for the Delaware and Hudson Company.)

*Mr. Johnson* and *Mr. De Forest:*

The commodities clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies. Under the statutes of Pennsylvania and under the decisions of that State, a railroad company does not have an interest in the coal because of its ownership of shares of stock of coal companies. See act of assembly of

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Pennsylvania, approved April 26, 1855 (P. L. 329); *Commonwealth* v. *Monongahela Company*, 216 Pa. St. 114; *Shepard's Estate*, 170 Pa. St. 323; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Commonwealth &c.* v. *N. Y., L. E. & W. R. R. Co.*, 132 Pa. St. 591; *Buffalo Loan, Trust & Safe Dep. Co.* v. *Medina Gas & Electric Co.*, 162 N. Y. 67, 76; *Saranac & Lake Placid R. R. Co.* v. *Arnold*, 167 N. Y. 368, 374; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *Pullman Car Co.* v. *Mo. Pac. Co.*, 115 U. S. 587.

The commodities clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved. See *Ex parte Young*, 209 U. S. 147; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 595; *Chicago Railway Co.* v. *Minnesota*, 134 U. S. 418, 456.

The commodities clause is unconstitutional because, making illegal discriminations, it is not due process of law. If the act is improperly discriminating in any vital part, it is invalid as to the whole. All the vital portions of an act constituting a whole, have mutual relation, and any failure in any one vital part destroys the entire enactment. Non-uniformity cannot be sustained because sought to be effected under the guise of a classification of that which cannot be classified. A statute of the United States, establishing a public policy, in the matter of uniformity must stand upon the same basis as a statute of a State. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560. The commodities clause discriminates in three important particulars: between different owners of coal, without justification; between carriers of timber and its manufactured products; between different classes of common carriers.

The commodities clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The act is not a regulation but a prohibition. In discussing this proposition, there is no difference between the rights of

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an individual and the rights of a corporation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204. The *Lottery Case*, 188 U. S. 321, is not an authority sustaining the right of Congress to pass the commodities clause. In the present case, the article carried is harmful neither to morals nor to health. It is a necessity of life. The *Lottery Case* (*supra*), quoted from and discussed. As to what is included in the word "commerce," see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

Whilst prohibition of the transportation of articles injurious to health or morals is included within the idea of a regulation of commerce, a prohibition of such transportation, where the articles are necessaries of life, is not within such idea. A requirement that transportation shall be conducted without favoritism, or discrimination, and not at excessive rates, is included within a regulation. Congress may forbid contracts in restraint of trade, because such contracts interfere with commerce and indirectly regulate the same. *The Addyston Case*, 175 U. S. 211, 226.

Where articles are forbidden to be transported because the owner is engaged in the carriage of like commodities for itself as well as for others, such forbidding goes beyond the province of regulation and introduces something not within the grant of a power to regulate, *i. e.*, a condemnation of a duality of ownership and transportation which had resulted from legislation by the States, in a matter over which they had control. It practically takes away property, or at least destroys the value of property, vested in its owner by the law of the only country which can control it, *i. e.*, the State in which it is located.

Commerce does not result from any grant in the Constitution, to Congress, of power to permit or disallow the same, nor from any permission by Congress. It is an inherent right, possessed by every citizen. A prohibition, therefore, which does not regulate the right, but denies and destroys it, must rest upon a power different from that granted by a permission to regulate.

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The very grant of power to regulate commerce, recognizes the existence of a right to carry it on, derived from some other, and independent, source.

The right of property is one secured to every citizen of the United States, under and against the Government, by the Constitution of the United States. This right, which, as will be probably conceded, includes that of commerce, is taken away by the commodities clause. Countless hundreds of millions of dollars of property values are destroyed at a stroke of the Congressional pen, without evidence of the existence of any necessity for such destruction.

The interstate commerce which is forbidden by the commodities clause is (1) transportation of its own products by a railroad company; and (2) sales by the citizens of one State, of their property, to citizens of another State, under certain circumstances.

Conceding the right to regulate the transportation in such way and manner as to compel it to conform to all such reasonable rules as the legislature may prescribe, the right does not exist to prohibit it where such rules are complied with. Included in this denial, is a denial of the conclusion that duality of ownership and of transportation, *ex necessitate*, amounts to violation of such rules of transportation.

Neither intercourse between the States, involving a carriage of persons or of property, nor transactions of sale and purchase, involving a delivery, can be forbidden, unless the person against whom the prohibition goes, violates some law enacted properly in exercise of the power to regulate. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 199; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Adair* v. *United States*, 208 U. S. 161; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Ex parte Jackson*, 96 U. S. 727; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418, 455. Case of *Union Bridge Co.* v. *United States*, 204 U. S. 364, discussed and distinguished. The case of *New Haven Ry. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, is not an authority in

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support of the contentions of the United States herein. The case is clearly distinguishable from the case at bar.

Foreign commerce is the intercourse between two countries, which, often, may be hostile. In determining the extent of, and limitations upon, foreign commerce, we have recourse to the law of nations. We find that one nation, for the protection of its citizens and its property, may put an embargo upon trade and fetter the intercourse. Were it otherwise, the nation itself might be destroyed, because of its inability to protect itself against the danger of unlimited intercourse. When, therefore, Congress regulates foreign commerce, it regulates something which has inherent limitations. The nation's protection may be involved in the exercise of a power, under certain circumstances, to bar all communication. There is no need, and no right, to forbid the citizens of one State from transferring their possessions and their persons to another.

The theory of the Government is, that Congress may destroy the existence of several branches of commerce, and regulate what remains.

Domestic commerce is very different in its nature, scope and extent. It is the intercourse between the citizens of the different States in the transportation of persons and property from one to the other. This intercourse between citizens of the different States is an intercourse of persons, all of whom are citizens of a Union, which was largely created in order to bring about unlimited intercourse, saving only to such extent as it should be found necessary to regulate the same.

It is a fundamental right of every owner of property in one State, to sell it to citizens of another State, and to have the same, when thus sold, transported. This right cannot be forbidden by Congress. However the intercourse may be regulated, such regulation must proceed upon the concession of the inability to deprive, altogether, of the right.

If Congress may forbid commerce between the States in the sense of transactions in trade in harmless articles, it may forbid intercourse between persons. It may forbid the carrier to



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transport its shareholders or its directors, because it may be tempted to give them greater privileges in their carriage. *Buttfield* v. *Stranahan*, 192 U. S. 492; *Lawton* v. *Steele*, 152 U. S. 133; *Railroad Co.* v. *Richmond*, 19 Wall. 584.

The commodities clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

Any Federal statute which has for its purpose the destruction of title to property or of the enjoyment of property, title to which is vested by the law of the State in a third person, trenches upon the reserved right under the Tenth Amendment: *United States* v. *Fox*, 94 U. S. 315.

The commodities clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of liberty and property.

The power possessed by Congress to regulate commerce must be so exercised as not to destroy the right to dispose of property, or to make legal contracts concerning the use, or transportation, thereof.

To forbid a coal company to sell its coal to the citizens of another State, or to cause the same to be transported into such State, is to deprive it of its "liberty," because of the deprivation of the power to use its property, in accordance with its legal right. *McCray* v. *United States*, 195 U. S. 27; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 336; *Allgeyer* v. *Louisiana*, 165 U. S. 589.

The commodities clause is unconstitutional because it is in effect a taking of private property for public use without compensation.

An ownership of coal shares, involves the right to receive whatever benefit may result from the exercise of powers conferred by the law of the State which incorporated. Practically, to destroy the exercise of its franchises by the company, is to take its property as completely as though it was physically

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seized. *Mugler* v. *Kansas*, 123 U. S. 623; *United States* v. *Lynah*, 188 U. S. 445.

*Mr. William S. Opdyke, Mr. James M. Beck* and *Mr. Walker D. Hines* filed a separate brief on behalf of the Delaware and Hudson Company. The first point of their brief relates only to the case of the Delaware and Hudson Company:

The Delaware and Hudson Company being organized primarily to produce and handle anthracite coal, and possessing its railroad powers merely as an incident to such primary purpose, is not embraced in the prohibition of the commodity clause. The Delaware and Hudson Company is a corporation whose railroad powers were granted as an incident to its industrial powers. It is a corporation organized to acquire land and mine therefrom anthracite coal and supply the same to consumers, and its railroad powers are incidental to that particular purpose. Clearly the term "railroad company" as used in the commodity clause does not apply to every corporation which operates a railroad. There are numerous industries throughout the country which operate, as incidental to their business, more or less railroad mileage. As to such mileage these corporations may be charged with the duties of a common carrier, and as business may be handled on through bills of lading such corporations would be, with respect to such matters, carriers subject to the act to regulate commerce. Yet such corporations could not, in any just sense, be regarded as railroad companies within the meaning of the commodity clause. In this class the Delaware and Hudson Company is included. The legislative history of this company shows that it is a coal company with incidental railroad functions. Unless, therefore, the expression "railroad company" in the commodity clause is to be taken as meaning every corporation of an industrial character which merely as an incident to its industrial functions operates a railroad, then the clause should not apply to this appellee. It is perfectly legitimate for an industrial corporation to promote the efficiency and economy

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of its operations by the construction of railroads when legally empowered to do so. It would be a superlative injustice to treat an industrial corporation as a railroad company because of the operation of a railroad under such circumstances, and then, because the industrial corporation is so treated as a railroad company, to prohibit the industrial corporation from performing the very transportation functions which alone serve as the inducement to the operation of the railroad.

Another grave reason for not construing the clause to apply to this appellee is that such construction unnecessarily overturns a deliberate and long-settled policy jointly entered upon with respect to this appellee by the States of Pennsylvania and New York. The legislation of those two States with respect to this appellee shows a clear purpose to provide for the acquisition and mining of coal in Pennsylvania by a corporation formed for that purpose, and to provide further for the transportation of that coal to the State of New York by the same corporation. The commodity clause, if construed to apply to this company, does not merely impair, and to a large extent destroy, the rights of the individuals who have invested as bondholders and stockholders in the Delaware and Hudson, and the rights of individuals who may have contracted with that company, but the clause utterly nullifies the policy of the States of Pennsylvania and New York with reference to this corporation. An act of Congress ought not unnecessarily to be so construed as to nullify such a policy deliberately adopted and carried out by two States of the Union. The original legislation is now irrepealable by either of the two States.

To apply the commodity clause in this unnecessary manner to the Delaware and Hudson is to work a destruction of property rights of great magnitude, which have existed for nearly a century. To exclude appellee's coal from the only practical channel of interstate transportation is confiscatory, because largely destroying the value of appellee's coal and coal lands. To exclude the interstate coal traffic from appellee's railways

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is confiscatory, because largely destroying the value of these railways and equipment. Such confiscation would be unconstitutional. However, even if such unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

*Mr. George F. Brownell* and *Mr. Adelbert Moot* filed a separate brief on behalf of the Erie Railroad Company:

It is undisputed that the first predecessor of the Erie Railroad Company was organized in 1832, and that it is a stockholder in the Pennsylvania Coal Company which was authorized by a statute of Pennsylvania, in 1838, to transact the usual business of companies engaged in mining, transporting to market and selling coal, with power to purchase or lease coal lands, and to construct railroads, and that said coal company did acquire coal lands, develop mines, and enter into authorized contract relations with defendant's predecessors for the construction of railroads and the transportation of its coal to market.

The Hillside Coal & Iron Company was organized under a statute of Pennsylvania in 1869, with similar powers; and into this corporation many other coal corporations were afterwards merged, under the laws of Pennsylvania.

"Solely" to furnish an outlet, by authority of Pennsylvania and New York, this defendant's predecessors and said coal corporations, built railroads and mine branches in connection with said coal companies, to transport their coal to interstate markets; the railroads so built being duly authorized, and aggregating, in lines, branches, yards and sidings very expensive to build in the mountainous country in which they were built, about 190 miles.

These railroads will be "substantially valueless" if the defendant can no longer haul their tonnage to the usual interstate markets over its tracks, and the mines of these companies will be deprived of their only outlet to these markets, such

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interstate markets being substantially their only markets for their output.

These railroad lines, branches, sidings, and yards, built "solely" for the accommodation of this coal business, have little business except such coal business, and that coal business is of such magnitude that it constitutes over 22% of the entire freight tonnage of all the railway lines of the Erie Railroad Company, and brings it over 20% of its revenue for transportation, and to deprive the defendant of such coal tonnage would greatly impair, and in many cases wholly destroy, both mines and railways.

The bondholders of this defendant and its predecessors hold bonds aggregating upwards of $136,000,000 that rest upon these properties, which will be greatly impaired or destroyed if the authorized contract and stockholding relations of railroads and mining corporations above described are destroyed, as they will be if the commodities clause is upheld, and it is held to also apply to this defendant as a mere stockholder.

This defendant is a minority stockholder in the Temple Iron Company, some of the coal of which also reaches interstate markets over defendant's lines, but defendant has nothing to do with mining coal, or dealing in it, and is in no way interested in coal mining except as "a stockholder" in the three coal mining corporations named.

Anthracite coal is harmless and necessary fuel, and the investigation of the Anthracite Strike Commission shows there is nothing unnatural about the present status of the business, in view of the natural difficulties encountered, the capital necessary to develop and carry it on, and the authority necessarily given capital by the State of Pennsylvania, to cause the formation of corporations to develop the expensive coal mines, and, therefore, the present status of the business furnishes no reason whatever for such legislation as the commodities clause.

The present status of timber lands and lumbering, as compared with coal properties and mining, furnishes no reason to

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support the exemption of timber alone from the commodities clause.

The history of the commodities clause shows that it was enacted to prohibit mining according to the laws of that State, by corporations of Pennsylvania, by making it impossible for mining corporations of that State to sell in that State the coal mined, since the clause, if broadly construed, as the Government claims it should be, prohibits common carriers from carrying such coal to interstate markets upon any terms and conditions whatever, even for the lawful purchasers and consumers thereof.

The commodities clause not only vitally affects this defendant, and other railroad companies, if it is sustained as to stockholders, but it is vital to the interests of millions of citizens who are consumers of all necessary commodities, and also the stockholders and bondholders of all great industrial corporations, since they can no longer buy or sell the very necessaries of life without the consent of Congress.

That clause is unconstitutional because it is contrary to the fundamental and "unalienable" rights of citizens reserved to them by the Federal Constitution, by which they have the right to buy food, fuel, or other harmless necessaries of life, in any State they please, from anyone they choose, so long as their purchases are lawful in that State, although it is conceded the Federal Government can regulate, but not prohibit, the carriage of such necessaries to interstate markets.

Timber is a fuel, and Congress could not make a partial and unjust law discriminating between purchasers of timber fuel and purchasers of coal, or between stockholders and bondholders in common carriers owning timber lands and those owning coal lands, without violating the "due process of law" part of the Fifth Amendment, because there is no ground for exempting timber in the commodities clause, if it should apply to any fuel at all.

The only possible effect of the commodities clause upon coal is upon the mining or production thereof, if that clause is literally obeyed, hence it does not regulate interstate commerce,

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it being a harmless and necessary commodity, but it undertakes to regulate its antecedent intrastate production, contrary to the Constitution and all such precedents.

MR. JUSTICE WHITE delivered the opinion of the court.

We dismiss for the present a contention made by one of the corporations that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other States. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been

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sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other States, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.[1]

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[1] It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the State of New York, April 23, 1823, and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital

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After the first day of May, 1908, the Government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying

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in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads, in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it, viz., The Northern Coal & Iron Company, The Jackson Coal Company, and The Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company, and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities clause" does not apply to it because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes,

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in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to ac-

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as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

(2) "The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867 and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those

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complish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the first section of the act to regulate commerce, as amended

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of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part, of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15th, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not

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and reënacted by the law usually referred to as the Hepburn Act, approved June 29, 1906, c. 3591, 34 Stat. 584, contained a provision, generally known as the commodities clause, which

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to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849; that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1st, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been and continues to be, under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15th, 1869, entitled "An act to authorize railroad and canal companies

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caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of

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to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "Interstate Commerce Act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13th, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad

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the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities

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Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant, as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Company, a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defend-

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clause, they all defended substantially upon the ground that when correctly interpreted the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the Fifth Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that in any event the clause was repugnant to the Constitution, because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the Government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject

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ant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Inc., owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1st, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal

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was at least formally approached, not for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called commodities clause amendatory to the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the agreed facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized and the relevant industrial condi-

year, or $15,010,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its business could not be continued, except at a net loss of many millions of dollars per annum.



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tions which being matters of common knowledge may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other States. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada, and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any

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point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. Rep. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that in a large and ultimate sense it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in

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whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined or produced by them or under their authority, or which they own or may have owned in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined or produced by a corporation, in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the Government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the Government: "It (the clause) forbids the carrier, who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in

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accordance with this principle, the insistence in argument is that it was the duty of the carrier who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the Government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the Government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the Government relies.

Let us as a prelude to an analysis of the clause, for the purpose of fixing its true construction and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the Government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the Government has placed upon it. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate com-

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merce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be in and of themselves lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants alleged to have been secured by valid state laws. We further concede for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the Government as to the meaning of the commodities clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in

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interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide, (*a*) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (*b*) Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision, if the contention of the Government, as to the meaning of the commodities clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis, which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.

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*Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part, and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if at the time of the transportation they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the Government places upon the clause as a whole is in direct conflict with the literal meaning

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of the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case since in practical execution it would come to pass that where a carrier had manufactured, mined and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that as thus construed it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier and at the same time to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the Government, in view of the purpose of Congress to prohibit railroad companies engaged in

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interstate commerce from being at the same time manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions they should all be construed so as to accomplish the result intended, and, therefore, their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining and production from the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining and production if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the Interstate Commerce Law, prior to its amendment by the Hepburn Act, will serve to make clear the unsoundness of the proposition. The case referred to is that of the *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. In that case, after much consideration, it was held that the prohibitions of the Interstate Commerce

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Act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that in view of their long standing the construction which had been thus given to the act should not be departed from, "at least until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the *New Haven case*, to assume that the provisions as to manufacturing, mining and production, while they may be somewhat redundant, were nevertheless expressed

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for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the Government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and as we think, doubtful prohibitions so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the Government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded

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is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of *bona fide* manufacturing, mining or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested directly or indirectly." The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they cannot be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman Palace Car Co.* v. *Missouri Pacific R. R.*, 115 U. S. 587; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in

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which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven case, supra*. In that case the Chesapeake and Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the

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statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations en-

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tirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preëxisting rights of the railroad companies were subordinated. *Armour Packing Co.* v. *United States*, 209 U. S. 56.

We think it unnecessary to consider at length the contentions based upon the due process clause of the Fifth Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause

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under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because, (*a*) no penalties are sought to be recovered in these cases, and, (*b*) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware and Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines, and, undoubtedly, vast sums of money have been in-



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vested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that by the true construction of its charters the Delaware and Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

*And it is so ordered.*

MR. JUSTICE HARLAN, dissenting.

As these cases have been determined wholly on the construction of those parts of the Hepburn Act which are here in ques-

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tion, and as Congress, if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my non-concurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

## STRONG v. REPIDE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 110. Argued March 10, 11, 1909.—Decided May 3, 1909.

Although there is no technical finding of facts by the court of first instance of the Philippine Islands, if the opinion shows the facts on which the judgment is based and the courts below differ in regard thereto they may be reviewed by this court under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 691. *De la Rama* v. *De la Rama*, 201 U. S. 303.

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Where a sale made through an agent of the vendor has been effected by the fraud and deceit of the vendee, the sale cannot stand whether or not the vendor's agent had power to sell.

A director upon whose action the value of the shares depends cannot avail of his knowledge of what his own action will be to acquire shares from those whom he intentionally keeps in ignorance of his expected action and the resulting value of the shares.

This is a rule of common law, and also of the Spanish law before the adoption of the Philippine Civil Code; and, under §§ 1261–1269 of that code, a contract obtained under such circumstances can be avoided by the party whose consent would not have been given had he known the facts within the knowledge of the other party.

Even though a director may not be under the obligation of a fiduciary nature to disclose to a shareholder his knowledge affecting the value of the shares, that duty may exist in special cases, and did exist upon the facts in this case.

In this case the facts clearly indicate that a director of a corporation owning friar lands in the Philippine Islands, and who controlled the action of the corporation, had so concealed his exclusive knowledge of the impending sale to the Government from a shareholder from whom he purchased, through an agent, shares in the corporation, that the concealment was in violation of his duty as a director to disclose such knowledge and amounted to deceit sufficient to avoid the sale; and, under such circumstances, it was immaterial whether the shareholder's agent did or did not have power to sell the stock.

While the method of payment cannot have induced the vendor's consent to a sale, where that method tended to conceal the identity of the purchaser and was part of a scheme to conceal facts, the knowledge of which would have resulted in vendor's refusal to sell, evidence as to the payment is admissible to show the fraudulent intent and scheme of the purchaser.

The expressed prohibitions in § 1459 of the Spanish Civil Code against directors of corporations acquiring shares of stock entrusted to them do not apply to purchases from others.

An expressed prohibition against directors acquiring shares held by themselves in a fiduciary capacity does not refer to purchases by directors of shares from others, or so limit the prohibitions against purchases of stock by directors that a sale to one cannot be avoided by his deceit in not disclosing material facts within his exclusive knowledge.

Although there may be objections to the form of judgment in the Court

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of First Instance as they are not of a material nature this court will follow the same course.
6 Philippine, 680, reversed.

THIS action was commenced on the twelfth day of January, 1904, in the Court of First Instance of the city of Manila, Philippine Islands, by the plaintiffs in error, Eleanor Erica Strong and Richard P. Strong, her husband, against the defendant in error. It was brought by the plaintiff, Mrs. Strong, as the owner of eight hundred shares of the capital stock of the Philippine Sugar Estates Development Company, Limited, (the other plaintiff being added as her husband), to recover such shares from defendant (who was already the owner of 30,400 of the 42,030 shares issued by the company), on the ground that the shares had been sold and delivered by plaintiff's agent to the agent of defendant, without authority from plaintiff; and also on the ground that defendant fraudulently concealed from plaintiff's agent, one F. Stuart Jones, facts affecting the value of the stock so sold and delivered. The stock was of the par value of $100 per share, Mexican currency.

The plaintiff never had any negotiations for the sale of the stock herself; and was ignorant that it was sold until some time after the sale, the negotiations for which took place between an agent of the plaintiff and an agent of defendant, the name of the defendant being undisclosed.

In addition to his ownership of almost three-fourths of the shares of the stock of the company, the defendant was one of the five directors of the company, and was elected by the board the agent and administrator general of such company, "with exclusive intervention in the management" of its general business.

The defendant put in issue the lack of authority of the agent of the plaintiff, denied all fraud, and alleged that the purchase of the stock from plaintiff's agent (which stock was payable to bearer and transferable by delivery) was made by one Albert Kauffman, who afterwards sold and conveyed the same to the

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defendant, and that the defendant, prior to the commencement of the suit and prior to any demand made upon him by the plaintiff in error herein, had sold, transferred and delivered the stock to Luis Gutierrez, a citizen and resident of Spain. (He was a brother of the defendant.)

In April, 1904, the case came on for trial in the Court of First Instance, which, on the twenty-ninth of that month, duly decided it and stated certain facts in the cause upon which it based its opinion and judgment, among which were the facts that the agent of the plaintiff had no authority to sell or transfer the shares of stock in question, and also that the transaction resulting in the delivery of the stock to the agent of the defendant was fraudulent, because the defendant concealed from the plaintiff's agent facts affecting the value of the stock, which the defendant was in good faith bound to reveal, by reason of which the sale of the stock to defendant was made for the total sum of $16,000, Mexican currency, while within two months and a half the shares were worth $76,256, United States currency. Upon the findings the court directed that the plaintiff recover from the defendant the sum found to be due by the court, which (after deducting the $16,000, Mexican currency) amounted to $138,352.71, Philippine currency, and the costs of suit, and it was ordered that the judgment might be satisfied by the delivery to the plaintiff, Mrs. Strong, of her eight hundred shares of stock within the time mentioned in the decree, in which event the plaintiff was to pay the defendant $16,000, Mexican currency, or its equivalent in Philippine currency. Other particulars were stated in the decree.

On May 3, 1904, a motion was made by defendant for a new trial, which, on May 9, 1904, was overruled.

A bill of exceptions was then made and appeal filed. Subsequently, and on January 18, 1906, the same was duly argued in the Supreme Court of the Philippine Islands, and on April 28, 1906, a decision was rendered by the court, holding that the agent of the plaintiff had no power to sell or deliver her stock, and it affirmed the decree of the Court of First Instance

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on that ground, but not on the second ground taken by that court, that the sale of the stock through the plaintiff's agent had been procured by fraud on the part of the defendant.

Subsequently to the affirmance of the judgment the defendant, through his counsel, made a motion for a new trial on the ground of newly-discovered evidence, which consisted of a power of attorney (that had been mislaid and after the trial had been found) from Mrs. Strong to Mr. F. Stuart Jones and Mr. Robert H. Wood, which authorized both, or either of them, to sell or otherwise dispose of the property of the plaintiff as they or he might choose. After opposition this motion was granted and leave given to the parties to submit new evidence as to the nature of the authority delegated by the plaintiff in error to her agent Jones, and under that permission the newly-discovered power of attorney was put in evidence. Upon that piece of evidence the court held that the authority of the agent Jones was sufficient and that the paper became absolutely decisive of the issues in the case, and the order affirming the judgment of the court below was therefore set aside, the judgment of the Court of First Instance reversed and the action dismissed upon its merits. From that decree of reversal and dismissal the plaintiffs seek to bring the case here for review, and have sued out a writ of error and taken an appeal.

The facts out of which the controversy arises are in substance these:

In 1902 it was thought important for the Government of the United States to secure title, if reasonably possible, to what were called the friar lands in the Philippine Islands. To that end various inquiries were made on the part of the Government from time to time as to the possibility of obtaining title to all those lands and what would be the probable expense. The lands were not owned by the same people, but were divided among different and separate owners. The Philippine Sugar Estates Development Company, Limited, owned of these lands what are more particularly described as the Dominican lands,

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and they were regarded as nearly one-half the value of all the friar lands.

On July 5, 1903, the governor of the Philippine Islands, on behalf of the Philippine Government, made an offer of purchase for the total sum of $6,043,219.47 in gold for all the friar lands, though owned by different owners. This offer, so far as concerned that portion of the lands owned by defendant's company, was rejected by defendant in his capacity as majority shareholder, without any consultation with the other shareholders. The representatives of all the different owners of all the lands, including defendant's company, in answer to the above offer, then fixed their selling price at $13,700,000 for all of such lands. During the negotiations consequent upon these different offers, which lasted for some time after the first offer was made, an offer was finally, and towards the end of October, 1903, made by the governor of $7,535,000. All the owners of all these friar lands, with the exception of the defendant who represented his company, were willing and anxious to accept this offer and to convey the lands to the Government at that price. He alone held out for a better offer while all the other owners were endeavoring to persuade him to accept the offer of the Government. The defendant continued his refusal to accept until the other owners consented to pay to his company $335,000 of the purchase price for their land and until the Government consented that a thousand hectares should be excluded from the sale to it of the land of defendant's company. This being agreed to the contract for the sale was finally signed by the defendant as attorney in fact for his company, December 21, 1903. The defendant, of course, as the negotiations progressed knew that the decision of the question lay with him, and that if he should decide to accept the last offer of the Government his decision would be the decision of his company, as he owned three-fourths of its shares, and the negotiations would then go through as all the owners of the balance of the land desired it. If the sale should not be consummated and things should remain as they were, the defendant also knew that the

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value of the lands and of the shares in the company would be almost nothing. He himself says, in speaking of these lands owned by his company, that had the Government "given the haciendas the protection which they ought to have received they would have been worth $6,000,000 gold; but, considering the abnormal condition in which they were on account of the failure of the Government to protect these haciendas, it is impossible to fix any value; they were worth nothing; they were a charge." Also, the company had paid no dividends, and only lived on its credit, and could not even pay taxes. The company had no other property of any substantial value than these lands. They were its one valuable asset.

While this state of things existed, and before the final offer had been made by the governor, the defendant, although still holding out for a higher price for the lands, took steps, about the middle or latter part of September, 1903, to purchase the 800 shares of stock in his company owned by Mrs. Strong, which he knew were in the possession of F. Stuart Jones, as her agent. The defendant, having decided to obtain these shares, instead of seeing Jones, who had an office next door, employed one Kauffman, a connection of his by marriage, and Kauffman employed a Mr. Sloan, a broker, who had an office some distance away, to purchase the stock for him, and told Sloan that the stock was for a member of his wife's family. Sloan communicated with the husband of Mrs. Strong and asked if she desired to sell her stock. The husband referred him to Mr. Jones for consultation, who had the stock in his possession. Sloan did not know who wanted to buy the shares, nor did Jones when he was spoken to. Jones would not have sold at the price he did had he known it was the defendant who was purchasing, because, as he said, it would show increased value, as the defendant would not be likely to purchase more stock unless the price was going up. As the articles of incorporation, by subdivision twenty, required a resolution of the general meeting of stockholders for the purpose of selling more than one hacienda, and as no such general meeting had been called at

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the time of the sale of the stock, Mr. Jones might well have supposed there was no immediate prospect of a sale of the lands being made, while at the same time defendant had knowledge of the probabilities thereof, which he had acquired by his conduct of the negotiations for their sale, as agent of all the shareholders, and while acting specially for them and himself.

The result of the negotiations was that Jones, on or about October 10, 1903, assuming that he had the power, and without consulting Mrs. Strong, sold the 800 shares of stock for $16,000, Mexican currency, delivering the stock to Kauffman in Sloan's office, who paid for it with the check of Rueda Hermanos for $18,000, the surplus $2,000 being arranged for, and Kauffman being paid $1,800 by defendant for his services. The defendant thus obtained the 800 shares for about one-tenth of the amount they became worth by the sale of the lands between two and three months thereafter. In all the negotiations in regard to the purchase of the stock from Mrs. Strong, through her agent Jones, not one word of the facts affecting the value of this stock was made known to plaintiff's agent by defendant but, on the contrary, perfect silence was kept. The real state of the negotiations with the Government was not mentioned, nor was the fact stated that it rested chiefly with the defendant to complete the sale. The probable value of the shares in the very near future was thus unknown to any one but defendant, while the agent of the plaintiff had no knowledge or suspicion that defendant was the one seeking to purchase the shares. The agent sold because, as he testified, he wanted to invest the money in some kind of property that would pay dividends, and he was expecting nothing from this company, as negotiations for the sale of the lands had gone on so long, and there appeared no prospect of any sale being made, at any rate not for a very long time.

It is undeniable that during all this time the subject of the sale of the friar lands was frequently mooted and its probabilities publicly discussed in a general way. Such discussion was founded upon rumors and gossip as to the condition of the

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negotiations. The public press referred to it not infrequently, but the actual state of the negotiations, the actual probabilities of the sale being consummated, and the particular position of power and influence which the defendant occupied in such negotiations, prior to the time of the purchase of plaintiff's stock, were not accurately known by plaintiff's agent or by anyone else outside those interested in the matter as negotiators.

*Mr. Henry E. Davis* for plaintiffs in error and appellants:

Upon all the evidence in the case, even including the power of attorney, the defendant was guilty of the fraud alleged. "Consent given by error, under violence, by intimidation, or deceit shall be void." Civil Code, Art. 1265. "There is deceit when by words or insidious machinations on the part of one of the contracting parties, the other is induced to execute a contract which, without them, he would not have made." Civil Code, Art. 1269. See also Manresa, vol. 8, p. 623. And as to the principles governing this case, *Oliver* v. *Oliver*, 118 Georgia, 362; *Stewart* v. *Harris*, 69 Kansas, 498; *Miner* v. *Belle Isle Co.*, 93 Michigan, 97; *Ervin* v. *Oregon &c. Co.*, 27 Fed. Rep. 625, 631; *Wheeler* v. *Abilene &c. Co.*, 159 Fed. Rep. 391; *Sidell* v. *Mo. Pac. Ry.*, 78 Fed. Rep. 424; *Ritchie* v. *McMullen*, 79 Fed. Rep. 522; *Farmers' Loan & Trust Co.* v. *New York Co.*, 150 N. Y. 410; *Hunter* v. *Hunter*, 50 Missouri, 229; *Stone* v. *Moody*, 84 Pac. Rep. 617; 1 Bigelow on Fraud, pp. 231, 297, 312; Domat's Civil Law, vol. 1, p. 574, No. 1457; *Id.*, p. 584, No. 1490; *Id.*, p. 510, No. 1259; *Id.*, No. 1260; *Id.*, p. 511, No. 1262; Escriche, Fraude.

*Mr. George E. Hamilton*, with whom *Mr. John W. Yerkes*, *Mr. M. J. Colbert* and *Mr. John J. Hamilton* were on the brief, for defendant in error:

Under the facts of this case the decisions of the courts of several of the States, holding that a director and stockholder must disclose his intention to another stockholder before buying stock from him, have no application, even if that rule was the

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correct rule under the authorities controlling the question in this country; but that rule is not supported by the current of American authority. *Hooker* v. *Midland Steel Co.*, 117 Ill. App. 441; *Haarstick* v. *Fox*, 9 Utah, 110.

While directors stand in a fiduciary relation to the corporation itself, they do not stand in that relation when dealing with other stockholders for the purchase or sale of stock. In the purchase and sale of stock between stockholders there must be some actual misrepresentation in order to constitute fraud. Mere silence is not sufficient. *Walsh* v. *Goulden*, 130 Michigan, 531. See also *Krumbhaar* v. *Griffiths*, 151 Pa. St. 223; *Bloom* v. *Loan Company*, 152 N. Y. 114; *O'Neil* v. *Ternes*, 32 Washington, 528.

A director of the corporation itself may buy and sell its stock like any other individual. He is entitled to the benefit of his facilities for information. No confidential relation exists between him and a stockholder, as to sales of the stock; and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction can not be set aside for fraud. See Cook on Corporations, 4th ed., 1898, § 320, p. 622; and Taylor on Corp., 5th ed., § 698; Beach on Corp., §§ 246, 614.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

The Court of First Instance at Manila gave judgment in favor of the plaintiffs on two grounds discussed in the opinion, one ground being that the agent of plaintiff, by whom the sale was concluded, had no authority to make it, and hence the delivery of the stock by him to defendant's agent was illegal; the other ground was that the defendant had been guilty of fraud in concealing certain facts from the seller affecting the value of the stock at the time when its sale was concluded.

Upon appeal to the Supreme Court of the islands the judgment was affirmed by a divided court, upon the ground of the

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lack of authority of the plaintiff's agent to make the sale, but not upon the ground of the alleged fraud on the part of the defendant. Two of the judges dissented, on the ground that there was authority to make the sale, although they agreed with the majority that there was no fraud.

One of the majority held not only that there was no authority to sell, but that there was fraud, and therefore only concurred in the result in affirming the judgment for the plaintiff.

When the motion for a new trial was subsequently granted on account of newly-discovered evidence the majority of the court, on the authority of the second power of attorney (which was the newly-discovered evidence then received), held that it was sufficient to authorize the plaintiff's agent to make the sale he did in her behalf, and as the majority held there was no fraud in the case, the judgment for plaintiff was reversed and the complaint was dismissed.

Mr. Justice Johnson dissented, and filed a dissenting opinion in favor of the affirmance of the judgment of the Court of First Instance on both the grounds taken by it.

We are now called upon to review the judgment of the Supreme Court dismissing the complaint of the plaintiff. If the purchase of the stock by the defendant was obtained by reason of his fraud or deceit, it is not material to inquire whether the agent of the plaintiff had power to sell the stock. If fraud or deceit existed, the sale cannot stand. We shall therefore determine the question whether or not there was evidence of such fraud or deceit as would avoid the sale.

Although there is no technical finding of facts by the Court of First Instance, yet in its opinion that court does state facts upon which it bases its judgment, and which may be referred to for the purpose of determining what the facts are. On appeal or writ of error from the judgment of the Supreme Court of the Philippine Islands the facts (when the courts below differ) will be reviewed by this court under the tenth section of the act of July 1, 1902, c. 1369, 32 Stat. 691. *De la Rama* v. *De la Rama*, 201 U. S. 303, 309.

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A careful perusal of the evidence brings us to the conclusion that it was ample to sustain the judgment of the Court of First Instance, considered with reference to the law applicable to the Philippine Islands.

The Civil Code of that jurisdiction after providing by article 1261 for the requisites of a contract, among which is the "consent of the contracting parties," says in article 1265 as follows: "Consent given by error, under violence, by intimidation, or deceit, shall be void." Articles 1266 to 1268, inclusive, explain the meaning of the words as used in article 1265, and describe what may be error, under violence or by intimidation. It is then provided by article 1269 that "There is deceit when by words or insidious machinations on the part of one of the contracting parties the other is induced to execute a contract which without them he would not have made." The meaning of the words "insidious machinations" may be said to be a deceitful scheme or plot with an evil design, or, in other words, with a fraudulent purpose. Thus, the deceit which avoids the contract need not be by means of misrepresentations in words. It exists where the party who obtains the consent does so by means of concealing or omitting to state material facts, with intent to deceive, by reason of which omission or concealment the other party was induced to give a consent which he would not otherwise have given. Article 1269. This is the rule of the common law also, but in both cases it is based upon the proposition that, under all the circumstances of the case, it was the duty of the party who obtained the consent, acting in good faith, to have disclosed the facts which he concealed. *Stewart* v. *Wyoming Cattle Ranch Co.*, 128 U. S. 383, 388. This was the Spanish law before the adoption of the code. Partidas 5, Titulo 5, Ley 57; Partidas 7, Titulo 16, Ley 1. See also Scaevola, Codigo Civil, Articles 1269, 1270. In such cases concealment is equivalent to misrepresentation.

The question in this case, therefore, is whether, under the circumstances above set forth, it was the duty of the defendant, acting in good faith, to disclose to the agent of the plaintiff

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the facts bearing upon or which might affect the value of the stock.

If it were conceded, for the purpose of the argument, that the ordinary relations between directors and shareholders in a business corporation are not of such a fiduciary nature as to make it the duty of a director to disclose to a shareholder the general knowledge which he may possess regarding the value of the shares of the company before he purchases any from a shareholder, yet there are cases where, by reason of the special facts, such duty exists. The supreme courts of Kansas and of Georgia have held the relationship existed in the cases before those courts because of the special facts which took them out of the general rule, and that under those facts the director could not purchase from the shareholder his shares without informing him of the facts which affected their value. *Stewart* v. *Harris*, 69 Kansas, 498; *S. C.*, 77 Pac. Rep. 277; *Oliver* v. *Oliver*, 118 Georgia, 362; *S. C.*, 45 S. E. Rep. 232. The case before us is of the same general character. On the other hand, there is the case of *Board of Commissioners* v. *Reynolds*, 44 Indiana, 509–515, where it was held (after referring to cases) that no relationship of a fiduciary nature exists between a director and a shareholder in a business corporation. Other cases are cited to that effect by counsel for defendant in error. These cases involved only the bare relationship between director and shareholder. It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three-fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large

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powers, and engaged in the negotiations which finally led to the sale of the company's lands (together with all the other friar lands) to the Government at a price which very greatly enhanced the value of the stock. He was the chief negotiator for the sale of all the lands, and was acting substantially as the agent of the shareholders of his company by reason of his ownership of the shares of stock in the corporation and by the acquiescence of all the other shareholders, and the negotiations were for the sale of the whole of the property of the company. By reason of such ownership and agency, and his participation as such owner and agent in the negotiations then going on, no one knew as well as he the exact condition of such negotiations. No one knew as well as he the probability of the sale of the lands to the Government. No one knew as well as he the probable price that might be obtained on such sale. The lands were the only valuable asset owned by the company. Under these circumstances and before the negotiations for the sale were completed the defendant employs an agent to purchase the stock, and conceals from the plaintiff's agent his own identity and his knowledge of the state of the negotiations and their probable result, with which he was familiar as the agent of the shareholders and much of which knowledge he obtained while acting as such agent and by reason thereof. The inference is inevitable that at this time he had concluded to press the negotiations for a sale of the lands to a successful conclusion, else why would he desire to purchase more shares which, if no sale went through, were, in his opinion, worthless, because of the failure of the Government to properly protect the lands in the hands of their then owners? The agent of the plaintiff was ignorant in regard to the state of the negotiations for the sale of the land, which negotiations and their probable result were a most material fact affecting the value of the shares of stock of the company, and he would not have sold them at the price he did had he known the actual state of the negotiations as to the lands and that it was the defendant who was seeking to purchase the stock. Concealing his identity when

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procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud on the part of the defendant. Why did he not ask Jones, who occupied an adjoining office, if he would sell? But by concealing his identity he could by such means the more easily avoid any questions relative to the negotiations for the sale of the lands and their probable result, and could also avoid any actual misrepresentations on that subject, which he evidently thought were necessary in his case to constitute a fraud. He kept up the concealment as long as he could, by giving the check of a third person for the purchase money. Evidence that he did so was objected to on the ground that it could not possibly even tend to prove that the prior consent to sell had been procured by the subsequent check given in payment. That was not its purpose. Of course, the giving of the check could not have induced the prior consent, but it was proper evidence as tending to show that the concealment of identity was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied and intentional omission to be characterized as part of the deceitful machinations to obtain the purchase without giving any information whatever as to the state and probable result of the negotiations, to the vendor of the stock, and to in that way obtain the same at a lower price. After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact he entered into the contract of sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If under all these facts he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside or the defendant cast in damages for his fraud.

The Supreme Court of the islands, in holding that there was



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no fraud in the purchase, said that the responsibility of the directors of a corporation to the individual stockholders did not extend beyond the corporate property actually under the control of the directors; that they did not owe any duty to the members in respect to their individual stock, which would prevent them from purchasing the same in the usual manner. While this may in general be true, we think it is not an accurate statement of the case, regard being had to the facts above mentioned.

It is said that by the code of commerce of the Philippine Islands the directors are declared to be mandatories of the society, and that by article 1459 of the Spanish Civil Code they are prohibited from acquiring by purchase, even at public or judicial auction, the property the administration or sale of which may have been entrusted to them, and that this is the extent of the prohibition. This provision has no reference to the purchase for himself, under such facts as existed here, by an officer of a corporation, of stock in the corporation owned by another. The case before us seems a plain one for holding that, under the circumstances detailed, there was a legal obligation on the part of the defendant to make these disclosures.

It is further objected, however, that the plaintiff, Mrs. Strong, denied that she had ever authorized her agent to sell this stock, and therefore by her own evidence there had never been any consent by her, obtained by fraud or otherwise, because there had never been any consent at all. There is nothing in this objection. Mrs. Strong contended that such authority as she had given never authorized her agent to sell this stock. That had nothing to do with the obligation of the defendant to make the disclosure of the facts already adverted to before the purchase of the stock from plaintiff's agent, and if, by reason of such failure, the defendant was guilty of a fraud in procuring the purchase from the plaintiff's agent it was a fraud, for which he became liable to the plaintiff, even though the plaintiff maintained that her agent was not authorized to sell. The court held that he was authorized, and therefore if he sold by

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reason of the fraud committed by defendant the plaintiff was thereby injured and the defendant became liable. In legal effect her consent was obtained by the fraud.

We have not overlooked the objections made in regard to the form of the judgment in the Court of First Instance, but are of opinion that such objections are not of a material nature, and we are disposed to follow the course pursued by that court in this case.

Other objections made by the defendant's counsel we have examined, but do not regard them as important. We therefore reverse the judgment of the Supreme Court, dismissing the complaint, and affirm that of the Court of First Instance, and

*It is so ordered.*

## DELAWARE AND HUDSON COMPANY *v.* ALBANY AND SUSQUEHANNA RAILROAD COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 416. Argued February 23, 24, 1909.—Decided May 3, 1909.

Equity rule No. 94, which is intended to secure the Federal courts from imposition upon their jurisdiction, recognizes the right of the corporate directory to corporate control, and expresses primarily the conditions which must precede the right of the stockholders to protect the corporation in cases where the directory is derelict; but the requirements of the rule may be dispensed with where they do not apply by reason of antagonism between the directory and the corporate interest.

Equity rule No. 94 is intended to have a practical application and it does not apply where the corporate interests can only be protected by a suit, which, if successful, would be detrimental to all the directors in other capacities.

Where, as in this case, stockholders of a lessor corporation sued, for its benefit, the lessee corporation, the directors of the two corporations being almost identical and the lessee corporation also owning, or

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holding the voting power, of sufficient stock of the lessee corporation to control a stockholders' meeting, the fact that the stockholders bringing the suit made no demand for relief upon the board of directors nor any effort to obtain relief at a stockholders' meeting does not prevent them from maintaining the bill.

*Quære*, and not decided, whether stockholders have power to compel directors to institute suits to which the latter are opposed.

THE facts, and the questions certified, are stated in the opinion.

*Mr. James M. Beck*, with whom *Mr. Alfred Opdyke* was on the brief, for the Delaware & Hudson Company:

Before a shareholder "is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court." *Hawes* v. *Oakland*, 104 U. S. 450; *Foss* v. *Harbottle*, 2 Hare, 461; *Macdougall* v. *Gardiner*, 1 Chancery Div. 13.

The stockholder of a corporation cannot on his individual responsibility commence an action for the benefit of the corporation against another corporation, without first applying to the managing body of his corporation to do so, and the fact that a majority of such managing body are also officers, directors, or employés of the corporation against which the suit is sought to be brought will not, in the absence of fraud, excuse the failure of the stockholder to make such application.

The only question which seems open to discussion is whether the mere fact that a majority of such board were also "officers, directors or employés" of the company sought to be sued, and that some of them had only a nominal stock interest in the Susquehanna Company, in itself and in the absence of any

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circumstances of fraud, so conclusively demonstrates the futility of such application as to excuse it. This conclusion could be justified only on the assumption that there is a conclusive presumption of law that the directors of a corporation will not institute a suit against another corporation, with which a majority are identified either as "officers, directors or employés."

The vice of the appellees' position is that they gratuitously assume that the directors of the Susquehanna Company, men of recognized standing and probity in the business world, would have been faithless to the trust reposed in them, and this solely for the reason that a majority were, as officers, directors or employés, also identified with the Delaware Company.

Certainly the presumption that directors will fully discharge their duties to all the stockholders should not be overborne at least until they have first refused, upon demand, to bring suit under conditions that will fully safeguard the interests of the stockholders, and until such demand and refusal the ordinary presumption of fidelity to a trust, as anounced by this court, still remains. *Hawes* v. *Oakland*, 104 U. S. 450; *Detroit* v. *Dean*, 106 U. S. 537; *Dimpfell* v. *Ohio Ry. Co.*, 110 U. S. 209; *Quincy* v. *Steel*, 120 U. S. 241; *Taylor* v. *Holmes*, 127 U. S. 489.

This rule is laid down in *Corbus* v. *Alaska Co.*, 187 U. S. 455, and also in *Dodge* v. *Woolsey*, 18 How. 331; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429. *Doctor* v. *Harrington*, 196 U. S. 579, relied upon by appellees, was exceptional and bears no resemblance to this case. And *Chicago* v. *Mills*, 204 U. S. 321, and *Ex parte Young*, 209 U. S. 123, 143, can also be distinguished.

Rule 94 itself assumes that the directors are presumed to act honestly and according to their best judgment for the interests of all, and this presumption cannot be overborne by the mere assertion of futility or by the pleader's license in the use of adjectives or adverbs. The fraud charged and proven

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must be actual and not constructive. "Epithets do not make out fraud." *Kent* v. *Canal Co.*, 144 U. S. 91; *Fogg* v. *Blair*, 139 U. S. 127.

In the following cases in state courts the bill was held not to be maintainable. *Wolf* v. *R. R. Co.*, 195 Pa. St. 91, 95; *Siegman* v. *Maloney*, 65 N. J. Eq. 372; *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378; *Dunphy* v. *Traveller Assn.*, 146 Massachusetts, 495; *O'Connor* v. *Virginia*, 184 N. Y. 46, 53.

If the complainants were excused under the facts certified from making any preliminary demand upon the directors, they nevertheless must show, in order to maintain their suit, that they could not have secured corporate action by an appeal to the stockholders of the Susquehanna Company. *Hawes* v. *Oakland*, 104 U. S. 450; *Foss* v. *Harbottle*, 2 Hare, 461; *Huntingdon* v. *Palmer*, 104 U. S. 482; *Quincy* v. *Steel*, 120 U. S. 241; *Chicago* v. *Mills*, 204 U. S. 321; *Doctor* v. *Harrington*, 196 U. S. 579.

*Mr. E. Parmalee Prentice*, with whom *Mr. George Welwood Murray* and *Mr. Charles P. Howland* were on the brief, for The Albany and Susquehanna Railroad Company *et al:*

Complainants are entitled under the facts stated by the Circuit Court of Appeals to sue as stockholders in the Susquehanna Company asserting rights due that corporation. They were not required before instituting this suit to demand relief from the directors of the Susquehanna Company. The present case is not within the purpose of Equity Rule 94 which is to prevent the maintenance of suits in Federal courts by collusion between complainants and the defendant corporation whose rights they assert. *Hawes* v. *Oakland*, 104 U. S. 450; *Citizens' Trust Co.* v. *Illinois Central R. Co.*, 205 U. S. 46, 47; *Doctor* v. *Harrington*, 196 U. S. 579, 588; *Chicago* v. *Mills*, 204 U. S. 321; *Young* v. *Mining Co.*, 71 Fed. Rep. 810; *Eldred* v. *American &c. Co.*, 99 Fed. Rep. 168.

The certificate shows that this suit is not collusive.

The present case is not within the requirements of Equity

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Rule 94, as to demand upon directors. The bill shows under oath that directors were hostile, that demand upon them would be idle and nugatory.

Equity will not permit double directors, by contracts made with themselves in other capacities, to bind shareholders or the corporation. *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587.

A court will not entertain litigation in which both sides are controlled by one *dominus litis*. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Mills* v. *Green*, 159 U. S. 651, 654; *East Tennessee &c. Co.* v. *Telegraph Co.*, 125 U. S. 695; *Hatfield* v. *King*, 184 U. S. 162. In fact parties who bring such litigation without disclosing the relationship of parties are guilty of punishable contempt of court. *Lord* v. *Veazie*, 8 How. 251; *Little* v. *Bowers*, 134 U. S. 547, 557; *Hatfield* v. *King*, 184 U. S. 162.

When directors are under adverse control stockholders may sue without demand for relief from a hostile board. *Citizens' Trust Co.* v. *Illinois Central Railroad*, 205 U. S. 46; *Doctor* v. *Harrington*, 196 U. S. 579; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455; *Heath* v. *Erie Railway Co.*, 8 Blatch. 347, 409; *Bill* v. *Telegraph Co.*, 16 Fed. Rep. 14, 19; *Columbia Dredging Co.* v. *Washed Bar Sand Dredging Co.*, 136 Fed. Rep. 710; *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. Rep. 869; *Dickinson* v. *Traction Co.*, 114 Fed. Rep. 232; *Eldred* v. *American &c. Co.*, 99 Fed. Rep. 168; *Berwind* v. *Canadian Pac. Ry. Co.*, 98 Fed. Rep. 158; *Ball* v. *Rutland R. Co.*, 93 Fed. Rep. 513; *Weir* v. *Bay State Gas Co.*, 91 Fed. Rep. 940; *Rogers* v. *Nashville &c. Ry. Co.*, 91 Fed. Rep. 299; *De Neufville* v. *Railroad Co.*, 81 Fed. Rep. 10.

Complainants were not required before instituting this suit to demand relief at a meeting of Susquehanna stockholders. See *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378, 387.

Demand on stockholders was not necessary in this case because under the Susquehanna charter stockholders could not grant relief. Laws, New York, 1850, Ch. 140.

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In all litigation involving the action of the corporation they (the directors) are its representatives in court. Stockholders cannot control or interfere with their management. *Railway Co.* v. *Alling*, 99 U. S. 463, 472; *Pullman Co.* v. *Missouri Pacific R. Co.*, 115 U. S. 587; *Beveridge* v. *New York &c. R. Co.*, 112 N. Y. 1, 21, 23; *Robinson* v. *Smith*, 3 Paige, Ch. 222; *McCullough* v. *Moss*, 5 Denio, 567; *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27; Morawetz on Corps., 2d ed., §§ 283, 510; Cook on Corps., 5th ed., §§ 684, 750.

Even if stockholders could by resolution require directors to institute litigation against the Delaware Company, they could not oust directors from office, before expiration of their terms. Laws, New York, Act of 1850, ch. 140, § 5.

No court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Mills* v. *Green*, 159 U. S. 651; *East Tennessee &c. Co.* v. *Telegraph Co.*, 125 U. S. 695.

Suits are regularly maintained in Federal courts without demand upon stockholders for a resolution directing litigation. *Ex parte Young*, 209 U. S. 123; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; *Smyth* v. *Ames*, 169 U. S. 466; *Pollock* v. *Farmers' &c. Trust Co.*, 157 U. S. 429; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Schultz* v. *Highland Gold Mines Co.*, 158 Fed. Rep. 337; *Perkins* v. *Northern Pacific Co.*, 155 Fed. Rep. 445; *Monmouth Investing Co.* v. *Means*, 151 Fed. Rep. 159; *Weir* v. *Bay State Gas Co.*, 91 Fed. Rep. 940; *Ball* v. *Rutland Railroad Co.*, 93 Fed. Rep. 513; *Dinsmore* v. *Southern Express Co.*, 92 Fed. Rep. 714.

No case was ever dismissed from a Federal court for want of an application to stockholders for a resolution directing litigation on behalf of the corporation.

There was nothing to submit to stockholders.

When a stockholders' vote makes a voidable act valid or void, it acts upon something which directors have done. In

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this case directors have done nothing and stockholders cannot control their course.

Stockholders cannot, by anything short of a unanimous vote, authorize or ratify gifts of corporate property. *Brewer* v. *Boston Theatre*, 104 Massachusetts, 378; *Jackson* v. *Ludeling*, 21 Wall. 616; *Ervin* v. *Oregon R. & N. Co.*, 27 Fed. Rep. 625, 631; *Mumford* v. *Ecuador Development Co.*, 111 Fed. Rep. 639; *Menier* v. *Telegraph Works*, L. R. 9 Ch. App. 350; *Gamble* v. *Queens County Water Co.*, 123 N. Y. 91; *Farmers' &c. Trust Co.* v. *New York &c. R. Co.*, 150 N. Y. 410.

Complainants desiring institution of a law-suit were not required by Rule 94 to ask for election of a new board of directors.

When this suit was instituted the Delaware Company controlled the Susquehanna stock vote.

Stockholders whose corporation is in adverse control are entitled to protection by injunction.

Complainants are entitled to maintain this bill by reason of their direct relations to both defendant corporations. Rule 94 does not apply to this case.

The Delaware Company has not only agreed with the lessor corporation by covenant in the lease to pay rent for the Susquehanna property, but by the guarantee on stock certificates has also agreed with individual stockholders that payment of this rent shall be made by dividing the corporate income as provided in the lease.

The Delaware Company has, therefore, in respect to corporate rights of the Susquehanna Company, entered into privity of contract with every Susquehanna stockholder, concerning division of the entire rent. *Hawes* v. *Oakland*, 104 U. S. 450.

Stockholders' suits cannot be at law, for the guarantees are part of the entire covenant to pay the entire rent arising from a single demise of corporate property.

An action to divide corporate income among stockholders must be brought in equity,—otherwise the lessee's right of offset would be defeated and unequal division of income made among stockholders. *Barr* v. *New York &c. Co.*, 96 N. Y. 444.

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MR. JUSTICE MCKENNA delivered the opinion of the court.

The certificate of the court is as follows:

"This cause comes here upon appeal from a final decree of the Circuit Court, Southern District of New York, which directs that the defendant Delaware and Hudson Company (hereinafter called the Delaware Company) pay to the defendant the Albany and Susquehanna Railroad Company (hereinafter called the Susquehanna Company) the amount of $1,107,923.24.

"The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the ninety-fourth equity rule. That question is a preliminary one, it has been held to be jurisdictional in character (*City of Chicago* v. *Mills*, 204 U. S. 321; *Doctor* v. *Harrington*, 196 U. S. 579), and this court desires the instruction of the Supreme Court for its proper decision.

*Statement of Facts.*

"The facts upon which the question arises are as follows:

"The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all a copy of the pleadings is hereto annexed, marked Exhibit 'A,' which may be referred to for a more detailed statement of the cause of action. The bill does not 'set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees.' Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure 'such action on the part of the shareholders.' Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, 'the

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causes of their failure to obtain such action' otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the act of April 2, 1850, which provides that 'there shall be a board of thirteen directors . . . to manage its affairs,' and for many years before this suit was brought a majority of the board of directors of the Susquehanna Company consisted of persons who were officers, directors or employés of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Company, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

| Names of directors of Susquehanna Company and dates of election as directors and officers. | Position in Delaware and Hudson Company and dates. |
|---|---|
| Robert M. Olyphant, 1878 | Director since 1872<br>President from 1884 to 1903<br>Chairman of the Board since 1903 |
| George I. Wilber, 1883 | Director since 1901 |
| David Wilcox, 1894 (Vice President, May 9, 1906) | General counsel 1894 to 1903<br>Director since 1899<br>President since 1903 |
| R. Suydam Grant, 1901 | Director since 1886 |
| Charles A. Peabody, 1902 | Director since 1902 |
| William S. Opdyke, 1903 | General counsel since 1903<br>Director since 1905 |
| Abel I. Culver, 1903 | A Vice President since 1903 |
| Charles A. Walker, 1892 | Treasurer 1892 |
| Robert Olyphant, 1887 (President since 1889) | Son of Robert M. Olyphant |
| William L. M. Phelps, 1873 (Secretary since 1870) | Secretary of the Albany and Susquehanna Company, elected by the board of directors. |
| Robert C. Pruyn, 1890 | Nominees of the Delaware Company as stated in the Delaware Company's answer. |
| James H. Manning, 1890 | |

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"Of these, Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any shares of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12th, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the protective committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill which is hereto annexed as Exhibit 'B.' Copies of

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such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

*Questions Certified.*

"Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

"First. 'Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?'

"Second. 'Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?'"

The questions in connection with the ninety-fourth equity rule present the issue in the case. The rule is as follows:

"94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded upon the rights which may properly be asserted by the corporation must be verified by oath, and must contain an allegation that the complainant was a shareholder at the time of the transaction of which he complains, or that his share had devolved upon him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not have otherwise cognizance. *It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.*"

Do the facts show a compliance with the rule, or rather that part of it which we have expressed in italics? The other parts of it are not involved.

It is the contention of appellant that the averments in the bill as exhibited in the certificate do not satisfy either the

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language of the rule or its substance. The argument is that (1) a shareholder, as a condition of his suit, must show that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, that his efforts must be earnest, not simulated, and this must be made apparent to the court; (2) his failure to apply to the managing body of the corporation will not, in the absence of fraud, be excused by the fact that such managing body are also officers, directors or employés of the corporation against which the suit is brought; (3) if the facts of this case excused from a preliminary demand upon the directors, the complainants were required to show "that they could not have secured appropriate action by an appeal to the stockholders of the Susquehanna Company." The appellees counter these contentions by asserting that (1) the case is not within the requirements of Rule 94. "The bill shows, under oath," it is said, "that the directors were hostile, and that demands upon them would be 'idle and nugatory.' . . ." (2) Complainants (appellees here) were not required to appeal to the stockholders of the Susquehanna Company because (*a*) the stockholders, under the charter of the company, could not grant relief; (*b*) even if such power existed, the stockholders "could not oust directors from office before expiration of their terms." And it is further contended that at the time the suit was instituted "the Delaware Company controlled the stock vote of the Susquehanna Company."

These opposing contentions present a not unusual case where the rule or principle of law is clear enough, but its application to a particular case is not so clear, and there is a contest of plausible constructions between which it is not always easy to decide. The purpose of Rule No. 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have

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indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply. There are cases which illustrate these contingencies. As a typical case of the first kind, that is, which enforces the doctrine that the rights of the corporation must be asserted through the corporation, *Hawes* v. *Oakland*, 104 U. S. 450, is cited. In that case *Dodge* v. *Woolsey*, 18 How. 331, was declared to be the leading case on the subject in this country, and, examining the latter case, it was said that it did not establish, nor was it intended to establish, a doctrine different in any material respect from that found in the other American cases and the English cases. And the doctrine was said to be that to enable a stockholder in a corporation to sustain in a court of equity a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as a foundation for the suit some action or threatened action of the managing board of directors which is beyond their authority; a fraudulent transaction completed or contemplated which will result in serious injury to the corporation or stockholders; where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of other stockholders; or where a majority of the stockholders themselves are oppressively and illegally pursuing a course inimical to the corporation or to the rights of the other stockholders. The court expressed the possibility that other cases might arise, but said "the foregoing may be regarded as an outline of the principles which govern this class of cases."

Determined by the principles enumerated, the court affirmed a decree sustaining a demurrer to a bill by a stockholder of the

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Contra Costa Waterworks Company, filed in behalf of himself and other stockholders against the company, its directors and the city of Oakland, to enjoin the city from taking, and the directors from permitting it to take, water from the works of the company without compensation. The bill alleged a request of the directors to take proceedings, and that they declined to do so. The bill also alleged injury to the corporation, diminution of dividends of the complainant and other stockholders, and a decrease of the value of their stock. Appellant adduces, as repeating and illustrating the doctrine of *Hawes* v. *Oakland*, the following cases: *Dimpfell* v. *Ohio & Mississippi Ry. Co.*, 110 U. S. 209; *Quincy* v. *Steel*, 120 U. S. 241; *Taylor* v. *Holmes*, 127 U. S. 489; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455. The latter case is quoted by appellant as putting unmistakable emphasis on Rule 94, and that the facts of the case at bar do not satisfy its requirements. The object of the suit was to enjoin the board of directors of the corporation from paying a license tax levied upon the corporation under the provisions of an act of Congress. Corbus, the complainant in the suit, was a stockholder of the corporation, and alleged, as the reason of the suit by him, that he was unable to request the directors of the company to refuse to pay the tax or apply for the license required by reason of their great distance from him, but that he had made such request of the officers of the company residing in Alaska, and that they had refused to comply with the request. Of this allegation the court said that it showed no compliance with Rule 94, and that complainant simply relied on the distance of the directors from where he resided as an excuse for not applying to them. "We are of opinion," it was said, "that the excuse is not sufficient. He should at least have shown some effort. If he had made an effort and obtained no satisfactory result, either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient."

A case sustaining the second proposition which we have

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mentioned, to wit, where the circumstances take the cases out of the rule, is *Doctor* v. *Harrington*, 196 U. S. 579. The suit was brought by Doctor and others as stockholders of a corporation called the Sal Sayles Company to set aside a judgment obtained by the Harringtons against that company. The bill alleged that the suit was not collusive; that complainants were unable to obtain redress from the company or "at the hands" of its stockholders. It further alleged that the board of directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of a majority of the capital stock of said corporation," likewise controlled "the action of the stockholders." It was further alleged that he refused to give any information with regard thereto, and declined to redress the wrongs of which complaint was made, or give complainants any opportunity to lay before the board of directors or the stockholders of the company the facts set forth.

It will be observed, therefore, that there was no compliance with the requirements of Rule 94, as expressed in its letter. The efforts that were made to secure the action of the managing directors or trustees were not "set forth with particularity." Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case not of compliance with the requirements of Rule 94, but circumstances which excused from such compliance.

Coming to consider the effect of those allegations, we said that Rule 94 contemplates that there may be, and provides for, a suit by the stockholder in a corporation founded on rights which may be properly asserted by the corporation. And we further said that "the ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him and made to act in any way detrimental to his interest. In other words, his interests and the interests of the



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corporation may be subservient to some illegal purpose." And we decided that these principles were satisfied by the allegations of the bill and that such antagonism existed between the complainants in the suit and the directors of the corporation that they would "suffer irremediable loss if not permitted to sue." In other words, the complainants were in such a situation by reason of the power which Harrington possessed over those who managed the corporation—directors and stockholders—that appeals to them for action would have been futile. Prior cases were considered, including *Dodge* v. *Woolsey* and *Hawes* v. *Oakland*, and the conclusion reached was pronounced to be in accordance with their doctrine.

Do the facts in the case at bar present the same situation that was passed on in *Doctor* v. *Harrington*? The certificate shows the following facts: The complaint was filed June 12, 1906. The suit was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental, or in the nature of rental, under a lease made in 1870. The Susquehanna Company was organized in 1850, and, under the law, its board of directors consisted of thirteen members, a majority of whom for many years before this suit was brought were also "officers, directors or employés of the Delaware Company." Indeed, they served as its president, vice president, treasurer, secretary, directors and general counsel—officers of dominating influence, it must be said. It appears that certain of the persons occupying those offices did not at the time the suit was brought own or hold in their own right any shares of stock in the Susquehanna Company, but shares of stock in that company owned by the Delaware Company were transferred to each of them on the books of the former company by the latter company for the purpose of qualifying them as directors. The number of shares of the capital stock of the Susquehanna Company and how held or owned, and the attitude of the owners thereof to the Delaware Company, appear in the certificate and need not be repeated.

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The certificate recites the following: "So far as appears from anything shown in the record none of the directors or officers of the Delaware Company ever before or after the bringing of this suit treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted."

The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. And though there are allegations in the bill of contrary import, the good faith of the directors need not be questioned. They might notwithstanding be firm in their views—firm to resist appeals against them. Their views seemed to persist through many years. At any rate, a situation was presented fully as formidable to the interest of stockholders in the Susquehanna Company as that presented in the *Harrington case*. And it may be well doubted whether, if the directors of the Susquehanna Company, so being directors of the Delaware Company, and who either from an apathy that endured through many years could discern no right in that company to assert or through conviction of the absence of right, were not the best agents to begin or conduct a litigation of such right. It was certainly natural enough that a stockholder should seek more earnest representatives and consider that the directors "occupied," to use the language of *Dodge* v. *Woolsey*, "antagonistic grounds in respect to the controversy" as to him. The attitude of the directors need not be sinister. It may be sincere. It was so in *Chicago* v. *Mills*, 204 U. S. 321, and *Ex parte Young*, 209 U. S. 123, and other cases. In this case it was certainly determined. It continued until after this suit was brought. Both the Delaware Company and the Susquehanna Company, then under "the administration of the Delaware Company," to quote from the Circuit Court of Appeals, demurred to the bill.

But it is contended that efforts should have been made and alleged to move the corporation to action through a stock-

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holders' meeting. In this contention there is again similarity to the *Harrington case*. It was there alleged that Harrington controlled the action of the stockholders "by reason of having possession of a majority" of the capital stock of the corporation. The control in the case at bar, therefore, may not have been as direct as in *Doctor* v. *Harrington*, but it was practically efficient. The stock of the Susquehanna Company consisted of 35,000 shares, of which the Delaware Company and its directors and officers held 8,840. The complainant and a so-called protective committee, a committee which the certificate states "from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill," controlled 8,000 shares. The certificate also states that the "entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in New York." The proposition then is, that notwithstanding the power of 8,840 shares, held by the managers of both corporations, against 8,000 held by complainants and the protective committee, complainants were required by Rule 94 to engage and organize all other stockholders, or enough of them to direct or change the corporate management; in other words, struggle for the control of the corporation with an adverse board of directors. And such struggle, appellant contends, "could not be regarded as presumptively futile," as there would be an appeal to "the self-interest of the remaining stockholders," and, it is pointed out, that the certificate recites that control through the stockholders was subsequently obtained. But it was obtained after the suit was begun and the antagonism of the directors was more clearly exhibited. The circumstances of this case preclude therefore an acceptance of appellant's proposition. Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases. Therefore, considering that this case by reason of its facts falls within the principle of *Doctor* v. *Harrington*, we do not review the cases cited by appellee, wherein, it is contended, suits were

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justified by demand on the directors alone, nor consider whether stockholders have the power to compel directors to institute suits to which the directors are opposed.

We answer both questions certified in the negative.

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## MANSON v. WILLIAMS, TRUSTEE IN BANKRUPTCY OF HUDSON CLOTHING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 169. Argued April 20, 21, 1909.—Decided May 3, 1909.

Where both the District Court and Circuit Court of Appeals have found as a fact that a partnership existed and owned the stock, while this court may, it will not, as a general rule, disturb the findings.

While an adjudication putting two or more persons into bankruptcy as partners is, for the purpose of administering the property, good as against all the world, it does not establish the existence of the partnership except as against parties entitled to be heard, and that question is not *res judicata* as against one who had denied being a partner and had not been heard.

It will be presumed that one who furnished capital for business expects gain therefrom, and if he is not a creditor receiving interest, his gain must come from profits as a partner.

In this case, there being evidence to support the finding of the two lower courts that a partnership existed by an implied understanding between two brothers pending the formation of a corporation, this court affirms the judgment notwithstanding that it might not necessarily have reached the same conclusion had the case been here tried in the first instance.

153 Fed. Rep. 525, affirmed.

THE facts are stated in the opinion.

*Mr. John W. Manson*, with whom *Mr. Harry R. Coolidge* was on the brief, for appellants.

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*Mr. John S. Williams*, with whom *Mr. Albert S. Woodman* was on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition by the appellee, the trustee in bankruptcy of the Hudson Clothing Company, that the appellants, the trustees in bankruptcy of Henry Hudson, pay over to the appellee the proceeds of a stock of goods alleged to have belonged to the company. The referee in bankruptcy made an order as prayed, which was sustained on the principal matter by the District Court, 148 Fed. Rep. 305; and the decree of that court was affirmed by the Circuit Court of Appeals. 153 Fed. Rep. 525; *S. C.*, 82 C. C. A. 475. A further appeal has been taken to this court. *Hewit* v. *Berlin Machine Works*, 194 U. S. 296.

The facts to be gathered from the opinion of the Circuit Court of Appeals and admitted are these. Henry Hudson became the owner of a stock of goods and desired to sell them. He also wished to help his brother James, and therefore put him in to do the selling. In the beginning he contemplated forming a corporation, turning the goods over to it and taking most of the stock as security, but letting James take the profits. This plan, however, was allowed to slumber, and the business was carried on by James for over two years. From an early moment James adopted the name of Hudson Clothing Company, using it as a sign, and in advertisements and on billheads. This was known to Henry, and when he advanced money to the business, as he did, he charged it on his books to the company. The bank account was kept with James, the bank book having the name Hudson Clothing Company above. Some of the exhibits in evidence have, besides the name of the company, the words "Henry Hudson, Pres.," and "James Hudson, Treas. and Mgr." There was no act of transfer on the part of Henry, but when he took goods from the shop he paid for them in the same way as if he had bought

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them elsewhere. Both the District Court and the Circuit Court of Appeals have found as a fact that the brothers were partners, and that the goods belonged to the firm. In such cases this court as a rule will not disturb the findings, but it has done so in some instances, *Darlington* v. *Turner*, 202 U. S. 195, 220, and in the case at bar the appellants contend that there really was no evidence to justify the result reached.

The appellee says that the question is concluded by the adjudication putting the company into bankruptcy, that being an adjudication against the two brothers. On the other hand, the record shows that the trustees of Henry, although they had filed a denial and answer, were not heard on that question. The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be, as against all the world. But it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt* v. *Kelsey*, 207 U. S. 43, 52. If the trustees of Henry were not entitled to be heard, it is because they had no concern with whether the alleged firm was wound up in bankruptcy or not, but only with the facts upon which creditors sought to wind it up, that is to say, the existence of the partnership and the title to the partnership assets, and these facts would remain open to dispute. As the trustees of Henry were not heard, it would come with bad grace from one who might have urged the foregoing considerations, to argue here that they are bound to admit anything except that Henry and his brother are in bankruptcy as partners. Furthermore, we gather from the opinion of the District Judge that all parties requested him to examine the evidence, and that the defense of *res judicata* really was waived. But as the partnership might have been a partnership in profits only, leaving the title to the capital in Henry alone, the adjudication, even if it established that there had been a partnership, could not conclude anything as to the title to the assets, the matter with which we now are concerned.

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We come back then to the question whether the findings of the two courts below are so clearly unwarranted as to call upon us to reconsider the evidence and to reverse the decree. In the first place we may lay on one side the fact that the parties began with the intent to form a corporation. They did not understand that they were acting as a corporation, nor did their dealings so far purport to be dealings of a corporation as to preclude the finding that was made. Now suppose that we take nothing more than the facts that one man furnishes capital and another his personal service in disposing of it, and that the latter is admitted to be interested in the profits if any, and at the same time not to be a debtor of the former. We have a right to infer that if a man furnishes capital he expects some gain from it. But as, in the case supposed, he is not a creditor and will not get interest, his gain must come from profits of the business. Some kind of joint interest therefore may be inferred, and the Circuit Court of Appeals would have had some warrant from these facts alone for concluding that Henry would have had a right to share the profits equally with James.

We are aware that there is evidence looking the other way, but that is not the question. On the other hand, the inference is strengthened by the facts that we have mentioned. Henry Hudson knew the name under which the business was done, and is likely to have known that his name sometimes was exhibited as president. It is true that the terms suggest a corporation, but under our usages not necessarily, and he at least knew that there was no corporation. He paid for the goods he bought, as if other interests were concerned. We mention these facts as admissions by conduct. Apart from the findings of the two courts it is unlikely that if great profits had been realized he would not have demanded a share. As to James, not only is it admitted that he was interested in profits, but there is some evidence that he contributed to the assets, as we shall explain.

If we take it as established that both brothers were interested

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in the business, it is not a difficult step to infer that the capital of the business was firm capital. Whether capital shall be attributed to the firm or to a partner is a matter that often escapes the attention of the members. For if there is a joint liability for debts it does not matter very much to the party furnishing the capital whether he owns it or whether he charges it to the firm. In a case where two partners contributed capital and two partners contributed time it was held that the capital belonged to the firm and that those who contributed time were bound to make good their proportion of the loss. *Whitcomb* v. *Converse*, 119 Massachusetts, 38. Moreover, when James went into the business a thousand dollars belonging to him were deposited in his name undistinguished from the deposits on the business account. The money or a part of it was used to pay liabilities of Henry in connection with the stock in trade. It is true that ultimately more than that sum was used in paying James's outstanding debts, but the mingling of funds tends to show a common interest. The facts that we have mentioned seem to us to constitute some evidence that the relation between the brothers was a partnership by implied understanding until a corporation should be formed. It does not matter that it was not formally recognized or that they may not have used the name to themselves if that is the fair result of what they did understand and intend. We do not say that we necessarily should have come to this conclusion if the case had been tried before us in the first instance, but upon a pure question of fact the error, if there was one, is not so plain as to call upon us to depart from our usual rule.

*Decree affirmed.*

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# *In re* WINN.

APPLICATION FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE SMITH McPHERSON, DISTRICT JUDGE OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

No. 12, Original. Argued April 5, 1909.—Decided May 3, 1909.

No cause can be removed from the state court to the Circuit Court of the United States unless it could have originally been brought in the latter court. *Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, and *Ex parte Wisner*, 203 U. S. 449.

A suit only arises under the Constitution and laws of the United States within the meaning of § 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, conferring jurisdiction on the Circuit Court when the plaintiff's statement of his own cause of action shows that it is based on those laws or that Constitution, and it is not enough that defendant may base his defense thereon. *Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149.

Although a defendant in the state court may set up a defense based on Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by this court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States.

A writ of mandamus when issued under § 688, Rev. Stat., is for the purpose of revising and correcting proceedings in a case already instituted in the courts and is part of the appellate jurisdiction of this court, which is subject to such regulations as Congress shall make.

Mandamus will lie from this court to compel a Circuit Court to remand a case to the state court where it is apparent from the record that the Circuit Court has no jurisdiction whatever, and the writ will lie even though the party aggrieved may also be entitled to appeal or writ of error.

While mandamus never lies where the party praying therefor has another adequate remedy, an appeal or writ of error at the end of a litigation, which must go for naught, is not an adequate remedy for a plaintiff

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whose case has been wrongfully removed from the state court to the Circuit Court, and held there against his protest.

The rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of that court to exercise its discretion on subject-matter not within its jurisdiction. *In re Pollitz*, 206 U. S. 323, and *Ex parte Nebraska*, 209 U. S. 436, distinguished.

While a general appearance in the Circuit Court after removal may amount to a waiver of objection to the jurisdiction if some Circuit Court has jurisdiction of the cause, *In re Moore*, 209 U. S. 490, neither appearance nor consent can confer jurisdiction where no Circuit Court has jurisdiction of the controversy. *Ex parte Wisner*, 203 U. S. 449.

THE facts are stated in the opinion.

*Mr. Guy A. Miller*, with whom *Mr. W. H. Bremner* was on the brief, for petitioner:

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts, and to keep them within their lawful bounds. *Virginia* v. *Rives* (*Ex parte Virginia*), 100 U. S. 316; *Ex parte Wisner*, 203 U. S. 449; *Ex parte Nebraska*, 209 U. S. 436, and *Re Pollitz*, 206 U. S. 323, distinguished, because in those cases the discretionary powers necessary to defeat the issuance of the writ of mandamus were exercised in connection with matters outside the record.

Want of jurisdiction from any cause appearing on the face of the record, entitles plaintiff to a writ of mandamus where the Federal court refuses to perform the duty to remand, as these cases are outside the discretion and jurisdiction of the court. Cases *supra* and *Virginia* v. *Paul*, 148 U. S. 107.

Under §§ 1, 2, 3, of the act of March 3, 1875, 18 Stat. c. 137, as amended by the act of March 3, 1887, 24 Stat. 552, c. 373, corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, an action commenced in the state court, by a citizen of another

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State, against a non-resident defendant, who is a citizen of a State other than that of plaintiff, cannot be removed by the defendant into the Circuit Court, on the ground of diverse citizenship, at least where the plaintiff resists the removal. *Ex parte Wisner, supra.*

A case cannot be removed to the Circuit Court from a state court, on the ground that it arises under the laws of the United States, unless that fact appears from the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. *Metcalf* v. *Watertown,* 128 U. S. 586; *Minnesota* v. *Northern Securities Co.,* 194 U. S. 453; *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 453.

It is not enough that in the progress of litigation a question under those laws would arise, since that does not show that plaintiff's action derived its life from those laws. *Louisville & Nashville Railroad Co.* v. *Mottley,* 211 U. S. 149.

The suggestion on the part of the defendant that he will set up a defense or claim under the laws of the United States does not make the suit one arising under those laws. *Tennessee* v. *Union & Planters' Bank, supra; Boston & M. Con. Copper S. Min. Co.* v. *Montana Ore Pur. Co.,* 188 U. S. 632.

Were the plaintiff to admit all the allegations in petition for removal, relative to the act to regulate commerce, it would only show that the plaintiff was unable to recover, and not that this case arises under any law of the United States. *Arkansas* v. *Kansas & Texas Coal Co.,* 183 U. S. 185.

The question whether or not a shipper is entitled to recover more than the declared value of stock in a contract for interstate shipment does not present a Federal question. *Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477.

*Mr. Nathaniel T. Guernsey,* with whom *Mr. Alonzo C. Parker* and *Mr. William E. Miller* were on the brief, for respondent:

The jurisdiction of the Circuit Court is beyond question.

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It affirmatively appears from the pleadings filed by the petitioner, Winn, that the parties are citizens of different States and that the amount in controversy exceeds the sum or value of $2,000. *Ex parte Wisner*, 203 U. S. 449, does not control, because both parties waived any objection which might have been urged to the maintenance of the suit in the Southern District of Iowa. The defendant did this by its petition for removal, general appearance, stipulation for, and filing, cost bond and for time to plead. *Construction Company* v. *Gibney*, 160 U. S. 217–220; *Re Moore*, 209 U. S. 490.

Upon the face of the plaintiff's petition, the case presented questions arising under the laws of the United States.

The character of a case is determined by the questions involved, and if it appears that the claim will be defeated by one construction of a law of the United States or sustained by the opposite construction, it is a case arising under the laws of the United States. *Starin* v. *New York*, 115 U. S. 248–257; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Bankers Casualty Co.* v. *Minn., St. P. &c. Ry. Co.*, 192 U. S. 371–380.

This doctrine does not conflict with the line of cases holding that a Federal question may not be imported into a case by the averments of the answer. Upon the face of the petition filed in the state court, the case necessarily involved the determination of whether the contract limiting the liability of the defendant to $50 is valid under the provisions of § 20 of the act to regulate commerce as amended by § 7 of the Hepburn Act, which has already been considered by the Interstate Commerce Commission, *Matter of Released Rates*, 13 Interstate Comm. Comm. 550, but has not been authoritatively determined by the courts. *Penna. R. R.* v. *Hughes*, 191 U. S. 477, having been decided prior to the Hepburn Act, is not in point.

Also whether the special contract to haul the hog in a single covered wagon is valid, it being a special service not covered by a tariff. *Wight* v. *United States*, 167 U. S. 512.

Also whether misrepresentation, by the shipper, of the value of the hog, in order to secure a lower rate, was a violation of

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the act to regulate commerce; and if so, its effect upon the plaintiff's claim.

Mandamus is not the proper remedy. The determination of the motion to remand involved an exercise of judicial judgment and discretion, which must be reviewed, if at all, by appeal. *In re Pollitz*, 206 U. S. 330; *Ex parte Nebraska*, 209 U. S. 436.

MR. JUSTICE MOODY delivered the opinion of the court.

This is an application for a writ of mandamus to the District Judge of the United States, acting as Circuit Judge, for the Southern District of Iowa, Central Division. The prayer of the petition was for a rule to show cause why a writ of mandamus should not issue commanding the Judge to remand the case to the state court in which it was originally brought. The rule was issued and cause was shown by a return. From the petition and the return the following state of facts appears: The petitioner, as assignee of the right of action of a shipper, brought in a state court of Iowa, an action at law against the American Express Company for the negligent transportation of a boar, whereby the animal was killed, to the damage, it was alleged, to the owner of $8,000. The transportation was under a written contract between the owner and the defendant, which was annexed to the declaration as an exhibit. The shipment was from a point in Iowa to a point in Nebraska. The citizenship of the plaintiff or his assignor was not alleged, but the defendant was alleged to be a citizen of New York. The defendant seasonably filed in the state court a petition for removal to the Circuit Court of the United States, with accompanying bond in proper form. The petition having been denied in the state court, the defendant duly filed a copy of the record in the Circuit Court of the United States, and it was there docketed, whereupon plaintiff moved to remand the case, and the motion was denied by the Circuit Judge. The plaintiff thereupon, without further action in the Circuit Court, began this proceeding.

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The petition for removal alleged that the plaintiff was a citizen of Missouri and the defendant "a joint stock association organized under the laws of the State of New York," but contained no allegation of the citizenship of the members of the association. It was agreed at the argument that the defendant was not a corporation but a joint stock association. Therefore the diversity of citizenship required to warrant a removal on that ground does not appear. The petition for removal, which is printed in the margin,[1] was not based upon diversity

[1] Your petitioner, the American Express Company, respectfully shows that it is the defendant in the above-entitled suit, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000.00).

That your said petitioner was, at the time of the bringing of this suit, and still is a joint stock association, organized under the laws of the State of New York, in such cases made and provided, and that the plaintiff was then and still is a citizen of the State of Missouri.

Your petitioner further shows that the said suit is one of a civil nature, in which the plaintiff seeks to recover from the defendant the sum of eight thousand dollars ($8,000.00) as damages on account of an alleged failure on the part of the defendant to comply with its obligations as a common carrier in the shipment and transportation of a hog, which the assignor of plaintiff offered to the defendant and which the defendant received from the assignor of plaintiff on or about the 30th day of August, A. D. 1907, for transportation from the State Fair Grounds at Des Moines in the State of Iowa, to the city of Lincoln, in the State of Nebraska.

That the defendant denies that it failed in any respect to perform its obligations with reference to the transportation of the said hog, and denies that it is liable upon the claim set up in the said suit, in any amount, and denies that, in any event, its liability could exceed the sum or value of fifty dollars ($50.00).

That the said suit is one arising under the laws of the United States. That your petitioner is, and was, at all the times mentioned in the petition in this suit a common carrier engaged in trade and commerce between the several States of the United States, and between the Territories thereof, and between the Territories and the several States.

That at the date of the shipment in question your petitioner was, and ever since that time has been, subject to the provisions of the act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, and of the acts of Congress amendatory thereof and supplementary

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of citizenship but upon the ground that the suit was one arising under the laws of the United States.

It is well settled that no cause can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the latter court. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 640; *Ex parte Wisner*, 203 U. S. 449.

The only ground of jurisdiction which is or can be suggested

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thereto, and that the alleged cause of action set up in said suit is based upon, grows out of and necessarily involves the construction of said acts of Congress. That among the questions arising under said acts and necessarily involved in said suit are—

(*a*) Whether the contract on which said suit is based is legal and enforceable by the shipper or the plaintiff as his assignee in view of the fact that it appears on the face of this contract that if the claim made in the petition as to the value of the hog in question is true, the shipper, by means of its undervaluation, violated the penal provisions of the Act to Regulate Commerce as amended.

(*b*) Whether, under the Act to Regulate Commerce, as amended, the plaintiff may assert a claim for damages in an amount in excess of the value declared by the shipper to be the true value, and, upon this declaration, made the basis of the rate for the interstate transportation in question.

(*c*) Whether, under the Act to Regulate Commerce, as amended, the provisions of the contract in suit, limiting the liability of the defendant to the sum declared by the shipper in said contract to be the actual value of the animal in question, is valid and enforceable.

(*d*) Whether, under the Act to Regulate Commerce, as amended, the plaintiff, as assignee of the shipper, is estopped to set up in this suit that the hog in question was of a greater value than the value declared to be its true value in the contract sued upon.

(*e*) Whether the undervaluation of the hog in question by the shipper in order to obtain a rate for its interstate transportation lower than the published established rate constituted a violation by the shipper of the penal provisions of the Act to Regulate Commerce, as amended.

(*f*) Whether, if said penal provisions were so violated, the plaintiff's suit is founded upon what in law is his own wrong so as to preclude a recovery by him.

(*g*) Other questions arising under said Act to Regulate Commerce, as amended.

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is that the suit was one arising under the Constitution and the laws of the United States. 25 Stat. 433, 434. It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. *Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149, and cases cited. If the defendant has any such defense to the plaintiff's claim it may be set up in the state courts, and if properly set up and denied by the highest court of the State may ultimately be brought to this court for decision.

Tested by these principles, the record, including the petition for removal, shows affirmatively that the case was not one arising under the laws of the United States. In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that under those laws the defendant had a defense in whole or in part to the cause of action stated in the declaration. But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto. In holding otherwise we think the learned Judge of the Circuit Court erred.

It is, however, argued that mandamus is not the remedy for the correction of such an error as we have pointed out, and that the aggrieved party should be left to his writ of error—a remedy which he undoubtedly has.

Authority to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by a provision in the original Judiciary Act, which now appears in § 688 of the Revised Statutes. A writ of mandamus issued under this provision is for the purpose of revis-



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ing and correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. *Marbury* v. *Madison*, 1 Cr. 137; *Ex parte Yerger*, 8 Wall. 85, 97; *In re Green*, 141 U. S. 325, 326.

In *Ex parte Crane*, 5 Pet. 190, the court of its own motion considered and sustained its authority to issue mandamus to inferior courts, and in that case directed by mandamus a judge of an inferior court to sign a bill of exceptions duly presented. Since that time writs of mandamus to inferior courts have been issued in all proper cases.

In *Ex parte Bradley*, 7 Wall. 364, it was held that a mandamus from this court would lie to an inferior court of the United States, directing it to restore an attorney to the rolls who had been disbarred, where the court was without jurisdiction in that regard. And it was said, page 377: "The ground of our decision . . . is, that the court below had no jurisdiction to disbar the relator. . . . No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void."

A specific application of the general principle announced in *Ex parte Bradley* has been made to cases where Circuit Courts of the United States have, without authority, assumed jurisdiction of a case originally brought in a state court, and it has frequently been held that mandamus from this court would lie to compel a Circuit Court to remand a case to the state court where it is apparent from the record that the Circuit Court has no jurisdiction whatever of the case. *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449. And see *Matter of Dunn*, 212 U. S. 374. In such a situation the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or an appeal. Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus

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was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. High on Extraordinary Legal Remedies, 3d ed., § 15. But where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy.

In *Virginia* v. *Rives*, *supra*, the State, after the cause had been removed to the Circuit Court, filed its petition in this court for mandamus, without having made a motion to remand in the Circuit Court, but in the opinion nothing turned on the absence of a motion to remand, and the remedy by mandamus was held to exist "when the case is outside of the exercise of (judicial discretion), and outside the jurisdiction of the Court . . . to which . . . the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds," p. 323. *Ex parte Bradley* is then referred to and its discussion approved. Then followed *Ex parte Hoard*, 105 U. S. 578, where it is held that if the Circuit Court had denied a motion to remand to the state court the party aggrieved must resort to his writ of error, and that mandamus would be denied, without determining whether the case was properly removed or not. In the three following cases, however, *Virginia* v. *Paul*, *Kentucky* v. *Powers*, and *Ex parte Wisner*, *supra*, the Circuit Court had denied motions to remand (the denial of the motion in *Kentucky* v. *Powers*, appearing in the judgment of the court below, 139 Fed. Rep. 452) before the petition for mandamus was filed. Nevertheless, the writ of mandamus was issued upon the ground that it was plain as matter of law from the record itself that the Circuit Court was without jurisdiction. This must now be regarded as the settled law.

The respondent, however, insists that mandamus will not lie to control the judgment or judicial discretion of the court to which the writ is proposed to be directed. This is true

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where the judgment or judicial discretion is within the limits of jurisdiction, but not otherwise. Wherever the record, including the petition for removal, shows that there are questions of fact upon whose determination the right of removal depends and upon which it is the duty of the Circuit Court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion, and if that discretion is erroneously exercised it can be corrected only by a writ of error or appeal. In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or appeals or take their place where they offer an adequate remedy to the aggrieved party. It is only in cases where the record makes it clear, as matter of law, that the Circuit Court was without jurisdiction to take any action whatever that the writ of mandamus lies. This distinction has been acted on many times by this court, and it is enough to refer to two very recent cases. Thus where the removability of a case turned upon the question whether there was a separable controversy, to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability; that its decision in that respect was the exercise of judicial discretion and could not be controlled by a writ of mandamus. *In re James Pollitz*, 206 U. S. 323. The same point was decided in *Ex parte Nebraska*, 209 U. S. 436. In each of these cases a distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached, and the right to a writ of mandamus in the latter case was affirmed.

As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record in the case at bar, and does not, as in *In re Pollitz* and *Ex parte Nebraska*, depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue.

A subordinate question must receive some attention. It is said that the petitioner in this case appeared generally in the

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Circuit Court after the removal of the case, and thereby waived his right to object to the jurisdiction, and *In re Moore*, 209 U. S. 490, is cited in support of the position. But that case simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits, and anything to the contrary said in *Ex parte Wisner*, 203 U. S. 449, was overruled, though the *Wisner case* was otherwise left untouched. See *Western Loan Co.* v. *Butte & Boston Mining Co.*, 210 U. S. 368, 369. Here, however, is a case where, upon its face, no Circuit Court of the United States had jurisdiction of the controversy, originally or by removal. In such a case the consent of the parties cannot confer jurisdiction. *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149, and cases cited.

*The rule is made absolute and the writ of mandamus awarded.*

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# INDEX.


## ACCOUNTS AND ACCOUNTING.

*Jurisdiction of court of equity to decree accounting by life insurance company.*

The wrongdoing of former officers of an insurance company, and their continuance in power, in the absence of any trust relation, gives no jurisdiction for an accounting in equity in a suit in which the company is the only defendant as between a simple debtor and creditor. *Equitable Life Assurance Soc.* v. *Brown*, 25.

*See* ACTIONS, 1;
RECEIVERS, 1.

## ACTIONS.

1. *Parties necessary to suit for accounting by policyholder against insurance company.*

Where a suit for accounting by a policyholder against an insurance company as sole defendant avers that the stockholders claim to own the surplus, no decree can be made as to such ownership without the presence of the stockholders as parties. *Equitable Life Assurance Soc.* v. *Brown*, 25.

2. *Personal injuries; actions for, maintainable where; law governing.*

Actions for personal injuries are transitory and maintainable wherever a court may be found that has jurisdiction of the parties and the subject-matter, *Dennick* v. *Railroad Co.*, 103 U. S. 11, and although in such an action the law of the place governs in enforcing the right, the action may be sustained in another jurisdiction when not inconsistent with any local policy. (*Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445.) *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.

3. *Personal injuries; actions for, maintainable where. Effect of act of New Mexico of March* 11, 1903.

An action for personal injuries sustained in New Mexico may be maintained in the courts of Texas subject to the conditions imposed by the territorial act of New Mexico of March 11, 1903, notwithstanding that act required actions of that nature to be brought in the District Court of the Territory. *Ib.*




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4. *Penalty recoverable in civil action.*

A penalty may be recovered by a civil action, although such an action may be so far criminal in its nature that the defendant cannot be compelled to testify against himself therein in respect to any matter involving his being guilty of a criminal offense. *Hepner* v. *United States*, 103.

*See* CONSTITUTIONAL LAW, 3, 4, 7, 8; CORPORATIONS, 8, 9; INSURANCE COMPANIES, 2; JURISDICTION, C 2, 9; E 2; F 2; STATUTES, A 11; TREATIES, 2, 3; VERDICT.

## ACTS OF CONGRESS.

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Mandamus, 1): *In re Winn*, 458. Section 709 (see Bankruptcy, 3, 5): *Coder* v. *Arts*, 223 (see Jurisdiction, A 1–6): *Western Union Telegraph Co.* v. *Wilson*, 52; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55; *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 72; *Keerl* v. *Montana*, 135 (see Practice and Procedure, 6): *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 72. Section 720 (see Jurisdiction, C 7): *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207. Section 906 (see Jurisdiction, F 2): *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55. Section 918 (see Jurisdiction, C 3): *Davidson Marble Co.* v. *Gibson*, 10.

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## AGENCY.

*See* CORPORATIONS, 3; STATES, 1;
JURISDICTION, E 2; VENDOR AND VENDEE, 1.

## ALIENS.

*See* CONSTITUTIONAL LAW, 11; TREATIES, 2, 3;
IMMIGRATION; VERDICT.

## AMBIGUITIES.

*See* STATUTES, A 6.

## AMENDMENTS TO CONSTITUTION.

*Fourth. See* CONSTITUTIONAL LAW, 5;
*Fifth. See* INTERSTATE COMMERCE, 5;
*Eleventh. See* CONSTITUTIONAL LAW, 3, 4, 8;
*Fourteenth. See* CONSTITUTIONAL LAW, 1, 2

## ANTI-TRUST LAW.

*Territorial limitation of operation of Sherman Anti-Trust Law.*

The prohibitions of the Sherman Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209, do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affect-

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ing other citizens of the United States. *American Banana Co.* v. *United Fruit Co.*, 347.

## APPEAL AND ERROR.

1. *Finality of judgment of state court—Writ of error will not lie to judgment remanding case for trial.*

Where the highest court of the State reverses an order of an inferior state court removing a cause and remands the case to the state court for trial, and, after trial and verdict for plaintiff, the judgment is sustained by the highest court, the last judgment is the only final one to which the writ of error will run from this court; defendant cannot prosecute a writ of error to the judgment remanding the cause. (*Schlosser* v. *Hemphill*, 198 U. S. 173.) *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.

2. *Criminal appeals by Government—Construction of § 935 of Code of District of Columbia.*

Under § 935 of the Code of the District of Columbia, act of March 3, 1901, c. 854, 31 Stat. 1341, a writ of error will not lie from the Court of Appeals to the Supreme Court of the District at the instance of the Government to review a judgment based on a verdict of not guilty. *United States* v. *Evans*, 297

3. *Object of act of March* 3, 1891.

The object of the act of March 3, 1891, c. 517, 26 Stat. 826, was to distribute the appellate jurisdiction of this court between it and the Circuit Court of Appeals, and to abolish the appellate jurisdiction of the Circuit Court. *Macfadden* v. *United States*, 288.

4. *Effect of appeal to Circuit Court of Appeals on right to direct writ of error from this court.*

Although where a real constitutional question exists a writ of error can be sued out directly from this court to the trial court under § 5 of the act of 1891, the right to do so is lost by taking an appeal to the Circuit Court of Appeals. (*Robinson* v. *Caldwell*, 165 U. S. 359.) *Ib.*

5. *When writ of error will lie to Circuit Court of Appeals in case appealed to that court which might have been brought direct to this court.*

Where the case can be taken directly to this court under § 5, or to the Circuit Court of Appeals under § 6, and the latter appeal is taken, while a writ of error will lie to the Circuit Court of Appeals if the jurisdiction of the Circuit Court rests, as shown by plaintiff's statement, on grounds, one of which is reviewable by this court, it will

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not lie if the only ground of jurisdiction is one where the judgment of the Circuit Court of Appeals is final. *Ib.*

*See* BANKRUPTCY, 3, 4, 5, 6;
JUDGMENTS AND DECREES, 2;
JURISDICTION.

## APPEARANCE.

*See* JURISDICTION, C 3, 10; F 3.

## BANKRUPTCY.

1. *Preferences—Fraud to invalidate conveyance under § 67c of bankruptcy act.*

An attempt to prefer is not necessarily an attempt to defraud, nor is a preferential transfer always a fraudulent one. The question of fraud depends upon the motive, and in order to invalidate a conveyance as one made to hinder, delay or defraud creditors within the meaning of § 67*c* of the bankruptcy act actual fraud must be shown. *Coder* v. *Arts*, 223.

2. *Preferences—Validity under § 67c of bankruptcy act, of mortgage given more than four months prior to petition in bankruptcy.*

In this case a mortgage given within four months of filing the petition to secure advances and while the mortgagee did not know of the mortgagor's insolvency, although the latter did, and which mortgage was found not to have been made with intent to hinder, delay or defraud creditors, *held* not to be voidable under § 67*e* of the bankruptcy law and that the mortgagee was entitled to priority thereon with interest. *Ib.*

3. *Appeals. What constitutes a proceeding in bankruptcy within meaning of § 25b of bankruptcy act.*

Where a creditor presents a claim to the trustee joined with a statement that he has security upon the estate which it is his purpose to maintain and upon which he is entitled to priority, he institutes a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings and an appeal lies to the Circuit Court of Appeals under § 25*b*, and the party aggrieved is not limited by § 24*b* to a petition for revision; and an appeal also lies to this court, under the rules prescribed by it, if the amount involved exceeds $2,000 and the question involved is one which gives jurisdiction to this court to review judgments of the state courts under § 709, Rev. Stat., or if a certificate of a justice of this court is made as required by par. 2 of subd. *b* of § 25. *Ib.*

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4. *Appeals from Circuit Court of Appeals. Sufficiency of compliance with General Order No.* 36.

General Order of this court, No. 36 in bankruptcy, which requires an appeal from a judgment of the Circuit Court of Appeals to be taken within thirty days, and that the court from which the appeal lies to make findings of fact and conclusions of law within thirty days *held* to be complied with by the Circuit Court of Appeals making findings within such thirty days, and directing them to be filed *nunc pro tunc* as of the day of entry of judgment, the appeal having also been taken within thirty days from such day of entry. *Ib.*

5. *Appeals from Circuit Court of Appeals. Involution of Federal question.*

Where the claimant against a bankrupt's estate asserts a lien which would be defeated under the construction placed upon the bankruptcy act by the trustee, and the lien is allowed, a Federal question is involved, which if involved in a case in the state court would give this court jurisdiction to review the judgment under § 709, Rev. Stat., and the case is appealable from the Circuit Court of Appeals to this court under § 25*b* of the bankruptcy act. *Ib.*

6. *Appeals from Circuit Court of Appeals. Scope of review.*

On appeals from the Circuit Court of Appeals under § 25*b* this court, under par. 3 of General Orders in Bankruptcy No. 36, can only look at the facts found by the Circuit Court of Appeals. *Ib.*

7. *Trustee's obligation in respect of assets pledged by bankrupt.*

Equity looks at substance and not at form. An advance payment for coal yet to be mined may be a pledge on the coal and, in that event, as in this case, the trustee in bankruptcy takes the mine subject to the obligation to deliver the coal as mined to the extent of the advancement. *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 126.

*See* JURISDICTION, A 9;
PARTNERSHIP, 1.

## BOUNDARIES.

1. *Missouri and Kansas—Effect of erosion on water boundary.*

The boundary line between Missouri and Kansas is and remains, notwithstanding its shifting position by erosion, the middle of the Missouri River from a point opposite the middle of the mouth of the Kansas or Kaw River. *Missouri* v. *Kansas*, 78.

2. *Missouri and Kansas—Effect of act of June* 7, 1836.

The act of June 7, 1836, c. 86, 5 Stat. 34, altering the western boundary

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of Missouri, is to be construed in the light of extrinsic facts; and, as so construed, its object was not to add territory to the State but to substitute the Missouri River as a practical boundary, so far as possible, instead of an ideal line along a meridian. *Ib.*

3. *Missouri and Kansas—Title to island in Missouri River.*
The result of this decision is that an island in the Missouri River west of the centre of its main channel, as that channel now exists, belongs to Kansas, notwithstanding such island is east of the original boundary line of Missouri. *Ib.*

## CARRIERS.

*See* INTERSTATE COMMERCE;
RATE REGULATION;
STATUTES, A 4.

## CASES DISTINGUISHED.

*Barney* v. *City of New York*, 190 U. S. 430, distinguished in *Siler* v. *Louisville & Nashville R. R. Co.*, 175.

*Ex parte Nebraska*, 209 U. S. 436, distinguished in *In re Winn*, 458.

*In re Pollitz*, 206 U. S. 323, distinguished in *In re Winn*, 458.

*Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, distinguished in *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 325.

*Rafael* v. *Verelst*, 2 Wm. Bl. 983, 1055, distinguished in *American Banana Co.* v. *United Fruit Co.*, 347.

*Siemens* v. *Sellers*, 123 U. S. 276, distinguished in *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 301.

*South Carolina* v. *United States*, 199 U. S. 437, distinguished in *Murray* v. *Wilson Distilling Co.*, 151.

*United States* v. *Sanges*, 144 U. S. 310, distinguished in *United States* v. *Dickinson*, 92.

## CASES FOLLOWED.

*Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, followed in *In re Winn*, 458.

*Chandler* v. *Dix*, 194 U. S. 590, followed in *Murray* v. *Wilson Distilling Co.*, 151.

*Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233, followed in *Murray* v. *Wilson Distilling Co.*, 151.

*Coder* v. *Arts*, 213 U. S. 223, followed in *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 126.

*De la Rama* v. *De la Rama*, 201 U. S. 303, followed in *Strong* v. *Repide*, 419.

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*Dennick* v. *Railroad Co.*, 103 U. S. 11, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.
*Dowell* v. *Appelgate*, 152 U. S. 327, followed in *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.
*Embry* v. *Palmer*, 107 U. S. 3, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.
*Ex parte Wisner*, 203 U. S. 449, followed in *In re Winn*, 458.
*Fairbank* v. *United States*, 181 U. S. 283, followed in *Selliger* v. *Kentucky*, 200.
*Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407, followed in *United States* v. *Delaware & Hudson Co.*, 366.
*In re Moore*, 209 U. S. 490, followed in *In re Winn*, 458.
*Insurance Co.* v. *Tweed*, 7 Wall. 44, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Calhoun*, 1.
*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197, followed in *United States* v. *Delaware & Hudson Co.*, 366.
*Leeds & Catlin* v. *Victor Talking Mach. Co.*, 213 U. S. 301, followed in *Same* v. *Same*, 325.
*Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149, followed in *In re Winn*, 458.
*McLean* v. *Railroad Co.*, 203 U. S. 38, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.
*Miner's Bank* v. *Iowa*, 12 How. 1, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.
*New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361, followed in *United States* v. *Delaware & Hudson Co.*, 366.
*Robinson* v. *Caldwell*, 165 U. S. 359, followed in *Macfadden* v. *United States*, 288.
*Schlosser* v. *Hemphill*, 198 U. S. 173, followed in *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.
*Steinmetz* v. *Allen*, 192 U. S. 543, followed in *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 301.
*Stewart* v. *Baltimore & Ohio R. R.*, 168 U. S. 445, followed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.
*Traction Co.* v. *Mining Co.*, 196 U. S. 239, followed in *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.
*Turner* v. *Williams*, 194 U. S. 279, followed in *Keller* v. *United States*, 138.
*United States* v. *Bitter Root Co.*, 200 U. S. 451, followed in *Equitable Life Insurance Co.* v. *Brown*, 25.
*United States* v. *Keitel*, 211 U. S. 370, followed in *United States* v. *Mason*, 115.
*United States* v. *Perez*, 9 Wheat. 579, followed in *Keerl* v. *Montana*, 135.
*U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, followed in *Davidson Marble Co.* v. *Gibson*, 10.

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CERTIORARI.

1. *Right to, of United States, in criminal case. Act of March* 3, 1891, *construed.*

The writ of certiorari cannot be granted under the act of March 3, 1891, c. 517, 26 Stat. 826, in a criminal case at the instance of the United States whatever the supposed importance of the questions involved. *United States* v. *Sanges* 144 U. S. 310, distinguished. *United States* v. *Dickinson*, 92.

2. *Right to, of United States, in criminal case. Act of March* 2, 1907, *construed.*

The act of March 2, 1907, c. 2564, 34 Stat. 1246, giving an appeal to the Government in certain criminal cases cannot be extended beyond its terms, or construed so as to extend the power of certiorari under the act of March 3, 1891, c. 517, 26 Stat. 826, to bring up a criminal case for the correction of mere error at the instance of the United States. *Ib.*

3. *Power of this court to issue.*

The power of this court to issue the writ of certiorari under § 14 of the Judiciary Act of 1789, now § 716, Rev. Stat., is not a grant of appellate jurisdiction to review for correction of mere error. *Ib.*

CIRCUIT COURTS.

*See* JURISDICTION, C;
REMOVAL OF CAUSES.

CIRCUIT COURT OF APPEALS.

*See* JURISDICTION, B.

CITIZENSHIP.

*See* JURISDICTION, D;
PORTO RICO, 1, 2.

CLOUD ON TITLE.

*See* INJUNCTION, 3.

COMBINATIONS.

*See* PATENTS, 1–5, 11–13.

COMITY.

*See* COURTS.

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COMMERCE.
*See* INTERSTATE COMMERCE.

COMMON LAW.
*See* RIPARIAN RIGHTS, 3.

CONFIRMATION OF TITLE.
*See* RIPARIAN RIGHTS, 2.

CONGRESS.

I. POWERS OF.
*See* CONSTITUTIONAL LAW, 5, 10, 11; IMMIGRATION; INTERSTATE COMMERCE, 5; MANDAMUS, 1; PORTO RICO, 1; STATUTES, A 2, 9; TERRITORIES, 3.

II. ACTS OF.
*See* ACTS OF CONGRESS.

CONSPIRACY.
*See* LEX LOCI, 2.

CONSTITUTIONAL LAW.
1. *Due process of law; effect of erroneous decision to deny.*
When parties have been fully heard in the regular course of judicial proceedings an erroneous decision does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment. *Bonner* v. *Gorman*, 86.

2. *Due process of law; quære as to application of provision of Fourteenth Amendment.*
*Quære*, and not decided, whether the due process provision of the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy. *Keerl* v. *Montana*, 135.
*See* INTERSTATE COMMERCE, 5.

*Equal protection of the law.* *See* INTERSTATE COMMERCE, 6.

3. *Judicial powers of United States. What amounts to suit against State within inhibition of Eleventh Amendment.*
Purchases made by state officers of supplies for business carried on by the State are made by the State, and suits by the vendors against

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the state officers carrying on or winding up the business are suits against the State and, under the Eleventh Amendment, beyond the jurisdiction of the Federal courts; and so *held* as to suits against commissioners to wind up the State Liquor Dispensary of South Carolina. *Murray* v. *Wilson Distilling Co.*, 151.

4. *Same.*

A bill in equity to compel specific performance of a contract between an individual and a State cannot, against the objection of the State, be maintained in the Federal courts. (*Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233.) *Ib.*

5. *Legislative powers of Congress. Full faith and credit to acts, etc., of Territories.*

Under the provisions of the Constitution which declare the supremacy of the National Government, Congress has power to enact, as it has done by §§ 905, 906, Rev. Stat., that the same faith and credit be given in the courts of the States and Territories to public acts, records, and judicial proceedings of the Territories as are given to those of the States under Art. IV, § 1 of the Constitution. (*Embry* v. *Palmer*, 107 U. S. 3.) *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.

*See* INTERSTATE COMMERCE, 6.

6. *Personal rights; double jeopardy; mistrial resulting from disagreement of jury not ground for plea of.*

Where a state court has the right to discharge the jury if it satisfactorily appear after a reasonable time that a disagreement is probable, and the state court so finds after the jury has been out for twenty-four hours, and discharges the jury, the result is a mistrial and the accused cannot on a subsequent trial interpose the plea of once in jeopardy by reason thereof, *United States* v. *Perez*, 9 Wheat. 579; and so *held* in regard to a trial in Montana where the jury had been discharged under § 2125, Penal Code of that State. *Keerl* v. *Montana*, 135.

7. *States; exemption from suit in Federal courts.*

The consent of a State to be sued in its own courts by a creditor does not give that creditor the right to sue in a Federal court. (*Chandler* v. *Dix*, 194 U. S. 590.) *Murray* v. *Wilson Distilling Co.*, 151.

8. *Same.*

Although by engaging in business a State may not avoid a preëxisting right of the Federal Government to tax that business, the State



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does not thereby lose the exemption from suit under the Eleventh Amendment. *South Carolina* v. *United States*, 199 U. S. 437, distinguished. *Ib.*

9. *States; taxing power; warehouse receipts for exported goods exempt from.*
Where goods are exempt from the taxing power of the State under the Constitution of the United States because not within the State, the protection of the Constitution extends to warehouse receipts for those goods locally present within the State; and this rule applied to whiskey in a foreign country, warehouse receipts for which were held by a person in Kentucky and sought to be taxed as personal property at owner's domicil. *Selliger* v. *Kentucky*, 200.

10. *States; police power reserved to.*
Speaking generally, the police power is reserved to the States and there is no grant thereof to Congress in the Constitution. *Keller* v. *United States*, 138.

11. *States; powers reserved to; Federal legislation invalid as within. Immigration Act of* 1907 *construed.*
That portion of the act of February 20, 1907, c. 1134, 34 Stat. 898, which makes it a felony to harbor alien prostitutes *held*, unconstitutional as to one harboring such a prostitute without knowledge of her alienage or in connection with her coming into the United States, as a regulation of a matter within the police power reserved to the State and not within any power delegated to Congress by the Constitution. *Ib.*

CONSTRUCTION.

*See* CONTRACTS, 1, 2, 3;
STATUTES, A.

CONTRACTS.

1. *Construction; consideration of circumstances surrounding parties at time of making.*
The object of construction of a contract is to effectuate the intention of the parties in making it; and it should be interpreted in the light of the circumstances surrounding the parties at the time when it was made. *Sand Filtration Corporation* v. *Cowardin*, 360.

2. *Construction; when cotemporaneous contracts not construed together.*
Although contracts relating to the same subject may be dated the same day they need not be construed together as one instrument if all the parties to both are not in privity. *Ib.*

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3. *Construction of agreement to pay a sum out of profits.*

An agreement to pay a sum out of profits of a contract *held*, in this case, not to depend on whether profits were or were not realized by a subcontractor but only on whether such profits were realized by the party making the contract. *Ib.*

4. *Avoidance; concealment by one party from the other, of material facts, as ground for.*

Where there is a duty on a party to a contract, acting in good faith, to disclose material facts within his exclusive knowledge to the other party, concealment of those facts is equivalent to misrepresentation and ground for avoiding the contract; this is a rule of common law, and also of the Spanish law before the adoption of the Philippine Civil Code; and, under §§ 1261–1269 of the Civil Code of the Philippine Islands, a contract obtained under such circumstances can be avoided by the party whose consent would not have been given had he known the facts within the knowledge of the other party. *Strong* v. *Repide*, 419.

*See* CONSTITUTIONAL LAW, 4;
INSURANCE COMPANIES, 3.

## CORPORATIONS.

1. *Directors—Right of director to acquire shares from one kept in ignorance of conditions affecting value.*

A director upon whose action the value of the shares depends cannot avail of his knowledge of what his own action will be to acquire shares from those whom he intentionally keeps in ignorance of his expected action and the resulting value of the shares. *Strong* v. *Repide*, 419.

2. *Directors; duty of one purchasing shares from shareholder to disclose knowledge affecting value.*

Even though a director may not be under the obligation of a fiduciary nature to disclose to a shareholder his knowledge affecting the value of the shares, that duty may exist in special cases, and did exist upon the facts in this case. *Ib.*

3. *Directors; violation of duty by one purchasing shares from shareholders in concealing exclusive knowledge affecting value. Avoidance of sale for deceit.*

In this case the facts clearly indicate that a director of a corporation owning friar lands in the Philippine Islands, and who controlled the action of the corporation, had so concealed his exclusive knowledge of the impending sale to the Government from a shareholder

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from whom he purchased, through an agent, shares in the corporation, that the concealment was in violation of his duty as a director to disclose such knowledge and amounted to deceit sufficient to avoid the sale; and, under such circumstances, it was immaterial whether the shareholder's agent did or did not have power to sell the stock. *Ib.*

4. *Directors; right to acquire shares of stock entrusted to them.*
The expressed prohibitions in § 1459 of the Spanish Civil Code against directors of corporations acquiring shares of stock entrusted to them do not apply to purchases from others. *Ib.*

5. *Same.*
An expressed prohibition against directors acquiring shares held by themselves in a fiduciary capacity does not refer to purchases by directors of shares from others, or so limit the prohibitions against purchases of stock by directors that a sale to one cannot be avoided by his deceit in not disclosing material facts within his exclusive knowledge. *Ib.*

6. *Stockholders' right to protect corporation where directory derelict—Effect of equity rule No.* 94.
Equity rule No. 94, which is intended to secure the Federal courts from imposition upon their jurisdiction, recognizes the right of the corporate directory to corporate control, and expresses primarily the conditions which must precede the right of the stockholders to protect the corporation in cases where the directory is derelict; but the requirements of the rule may be dispensed with where they do not apply by reason of antagonism between the directory and the corporate interest. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 435.

7. *Same.*
Equity rule No. 94 is intended to have a practical application and it does not apply where the corporate interests can only be protected by a suit, which, if successful, would be detrimental to all the directors in other capacities. *Ib.*

8. *Stockholders; suit by; resort to directory and stockholders' meeting as conditions precedent.*
Where, as in this case, stockholders of a lessor corporation sued, for its benefit, the lessee corporation, the directors of the two corporations being almost identical and the lessee corporation also owning, or holding the voting power, of sufficient stock of the lessor corpora-

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tion to control a stockholders' meeting, the fact that the stockholders bringing the suit made no demand for relief upon the board of directors nor any effort to obtain relief at a stockholders' meeting does not prevent them from maintaining the bill. *Ib.*

9. *Quære as to stockholders compelling directors to sue.*

*Quære*, and not decided, whether stockholders have power to compel directors to institute suits to which the latter are opposed. *Ib.*

*See* EQUITY, 2, 3; JURISDICTION, D; E 1; INSURANCE COMPANIES; PORTO RICO, 1, 2; INTERSTATE COMMERCE, 3; STATUTES, A 4; STATES, 1.

COURTS.

*Federal and state; acceptance by former of judgment of latter.*

As the Federal court accepts the judgment of a state court construing the meaning and scope of a state enactment, whether civil or criminal, it should also accept the judgment of a state court based on the verdict of acquittal of a crime against the State. *United States* v. *Mason*, 115.

*See* CONSTITUTIONAL LAW, 5, 7; JURISDICTION; CORPORATIONS, 6; REMOVAL OF CAUSES; INJUNCTION, 2; SOVEREIGNTY, 1; TREATIES, 1.

CRIMINAL APPEALS.

*See* APPEAL AND ERROR, 2; CERTIORARI, 2.

CRIMINAL LAW.

*Crimes embraced in* § 5509, *Rev. Stat.*

Section 5509, Rev. Stat., does not embrace any felony or misdemeanor against a State of which, prior to the trial in Federal court of the Federal offense the defendants had been lawfully acquitted by a state court having full jurisdiction. *United States* v. *Mason*, 115.

*See* CERTIORARI, 1, 2; CONSTITUTIONAL LAW, 11; LEX LOCI.

DECEIT.

*See* CORPORATIONS, 3, 5.

DEMURRER.

*See* PLEADING, 1, 2.

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DEPRIVATION OF PROPERTY.
*See* CONSTITUTIONAL LAW, 1.

DIRECTED VERDICT.
*See* VERDICT.

DIRECTORS OF CORPORATIONS.
*See* CORPORATIONS.

DISCHARGE OF JURY.
*See* CONSTITUTIONAL LAW, 6.

DISCOVERY.
*See* EQUITY, 6.

DISTRICT COURTS.
*See* JURISDICTION, D.

DISTRICT OF COLUMBIA.
*See* APPEAL AND ERROR, 2.

DOUBLE JEOPARDY.
*See* CONSTITUTIONAL LAW, 2, 6

DUE PROCESS OF LAW.
*See* CONSTITUTIONAL LAW, 1, 2;
INTERSTATE COMMERCE, 5, 6.

ELEVENTH AMENDMENT.
*See* CONSTITUTIONAL LAW, 3, 4, 8.

EQUAL PROTECTION OF LAWS.
*See* INTERSTATE COMMERCE, 6.

EQUITY.

1. *Interposition where remedy at law.*
Equity will not interpose where there is a remedy at law which is as complete, practicable and adequate as equity could afford. *Boise Water Co.* v. *Boise City*, 276.

2. *Presumption of injury to give equity jurisdiction, not indulged in.*
A municipality speaks through its council, and where the bill does not

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allege any facts showing threats to remove property of a complainant public service corporation such action will not be presumed so as to give equity jurisdiction. *Ib.*

3. *Interference with municipality in effort to collect license fee.*
A suit at law by a municipality to collect a license fee imposed by ordinance on a public service corporation contemplates continuance, and not restraint, of the business of such corporation, and, as the defense of unconstitutionality of the ordinance is open in that suit, equity should not interfere. *Ib.*

4. *Multiplicity of suits as ground for interposition of.*
In order to make the fear of multiplicity of suits a ground for the interposition of a court of equity, more than one suit must have been commenced, and the court should not interfere unless it is clearly necessary to protect complainant from continued and vexatious litigation. *Ib.*

5. *Multiplicity of suits as ground for jurisdiction.*
A complainant who can obtain all the relief to which he is entitled in a single suit cannot invoke the interference of a court of equity on the ground that defendant may be saved a multiplicity of suits against it by others situated similarly to himself. *Equitable Life Assurance Soc.* v. *Brown*, 25.

6. *Jurisdiction of cases of fraud wanting where adequate remedy at law.*
Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and where, so far as necessary, discovery may be obtained as well as in equity. (Rev. Stat. § 724; *United States* v. *Bitter Root Co.*, 200 U. S. 451.) *Ib.*

*See* ACCOUNTS AND ACCOUNTING; BANKRUPTCY, 7; INJUNCTION; INSURANCE COMPANIES, 2; PLEADING, 2; RECEIVERS, 1.

## EQUITY RULE NO. 94.

*See* CORPORATIONS, 6, 7.

## EVIDENCE.

1. *Opinion; qualification of lay witness to testify as to mental capacity of a testator.*
Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and conduct of that person, may, in addition to relating the signifi-

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cant instances of speech and conduct, testify to the opinion formed at the time of observation as to the mental capacity of such person. *Turner* v. *American Security & Trust Co.*, 257.

2. *Opinion—Determination of qualification of witness ordinarily for trial court.*

While a general rule cannot be framed for all cases, and in clear cases of abuse the appellate court should reverse, the determination of whether a witness is qualified to state his opinion as to the mental condition of a testator is for the trial judge who has all the evidence and the witness before him, and in this case the trial judge does not seem to have abused his discretion as to the admission of testimony. *Ib.*

3. *Remoteness and tendency to raise collateral issue as grounds for exclusion.*

Evidence as to an alleged delusion of testator thirty years before execution of the will *held* to be properly excluded both because of remoteness and of the tendency to raise a collateral issue as to whether the statements connected therewith were or were not actually false. *Ib.*

4. *Competency in will contest where issue mental incapacity.*

Where the wife as caveator attacks testator's soundness of mind because he referred to himself at times as a widower and at times as divorced, an agreement of separation and a deed referring to himself as widower admitted solely to explain why testator so referred to himself *held* competent for that purpose, but evidence by the wife as to her reasons for signing the agreement and other instruments, in which she joined with her husband as his wife, were properly excluded. *Ib.*

5. *Admission of incompetent evidence as reversible error—Cure of error by withdrawal from jury.*

The admission of incompetent evidence is not reversible error if subsequently it is distinctly withdrawn from the jury, and so *held* in this case where a letter was erroneously admitted but the presiding judge, at request of the party objecting to its admission, instructed the jury that nothing in such letter was to be taken as evidence of truth of the statements therein or even to be used for purposes of cross-examination. *Ib.*

*See* PRACTICE AND PROCEDURE, 6;
VENDOR AND VENDEE, 2.

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EXECUTION.
*See* SALES.

EXPORTS.
*See* CONSTITUTIONAL LAW, 9.

EXTRATERRITORIALITY.
*See* ANTI-TRUST LAW;
LEX LOCI.

FACTS.
*See* JURISDICTION, 11;
PLEADING, 1, 2;
PRACTICE AND PROCEDURE, 1–7.

FEDERAL QUESTION.
*When raised too late.*
Where the Federal question is raised for the first time on the second appeal and the state court refuses to consider it, it comes too late. *Bonner* v. *Gorman*, 86.
*See* BANKRUPTCY, 5;
JURISDICTION, A 3, 4, 5, 6; C 4, 5;
REMOVAL OF CAUSES, 1.

FIDUCIARIES.
*See* CORPORATIONS, 2, 5.

FIFTH AMENDMENT.
*See* INTERSTATE COMMERCE, 5.

FINAL JUDGMENTS.
*See* APPEAL AND ERROR, 1;
JUDGMENTS AND DECREES, 1, 2.

FOREIGN CORPORATIONS.
*See* JURISDICTION, E 1, 2;
STATES, 1.

FOREIGN PATENTS.
*See* PATENTS, 6, 7, 8.

FOURTH AMENDMENT.
*See* CONSTITUTIONAL LAW, 5.

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FOURTEENTH AMENDMENT.
*See* CONSTITUTIONAL LAW, 1, 2.

FRAUD.
*See* BANKRUPTCY, 1; EQUITY, 6;
CONTRACTS, 4; PROCESS;
VENDOR AND VENDEE.

FRAUDULENT CONVEYANCES.
*See* BANKRUPTCY, 1.

FULL FAITH AND CREDIT.
*See* CONSTITUTIONAL LAW, 5.

GENERAL ORDERS IN BANKRUPTCY.
*See* BANKRUPTCY, 4, 6.

GOVERNMENT.
*See* SOVEREIGNTY.

GOVERNMENT CONTRACTS.
*See* JURISDICTION, C 2;
STATUTES, A 11.

HEPBURN ACT.
*See* INTERSTATE COMMERCE;
STATUTES, A 4.

IMMIGRATION.
*Power of Congress over; control of aliens after arrival and of dealings therewith.*
Where there is collision between the power of the State and that of Congress, the superior authority of the latter prevails. While Congress has power to exclude aliens from, and to prescribe the terms and conditions on which aliens may come into, the United States, *Turner* v. *Williams*, 194 U. S. 279, that power does not extend to controlling dealings with aliens after their arrival merely on account of their alienage. *Keller* v. *United States*, 138.
*See* CONSTITUTIONAL LAW, 11;
VERDICT.

INFRINGEMENT OF PATENT.
*See* PATENTS, 9–13.

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## INJUNCTION.

1. *Against enforcement of tax; not ordinarily granted. Sufficiency of grounds for.*

As the defense of the unconstitutionality and illegality of a tax is open in a court of law, injunction should not issue against the enforcement of the tax merely because it is unconstitutional or illegal unless other circumstances bring the case within some clear ground of equity jurisdiction. *Boise Water Co.* v. *Boise City*, 276.

2. *Non-interference by Federal courts, by injunction, with fiscal arrangements of State.*

Even though some States may for convenience of remedy permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and Federal courts should not interfere by injunction with the fiscal arrangements of a State if the rights involved can be preserved in any other manner. *Ib.*

3. *Cloud on title as ground for enjoining collection of tax.*

Equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected by a suit at law in which the defense of its illegality is open, and it does not appear that the tax is a lien on any of complainant's property. *Ib.*

*See* JURISDICTION, C 7;
PRACTICE AND PROCEDURE, 2.

## INSURANCE COMPANIES.

1. *Status as trustee of policyholders.*

The Equitable Life Assurance Society is not a trustee of its policyholders under its charter and policies as the same have been construed by the highest courts of the State of New York. *Equitable Life Assurance Soc.* v. *Brown*, 25.

2. *Policyholder's right of action against; grounds for resort to equity.*

While wrongdoing, waste, and misapplication of funds reducing the surplus of an insurance company before distribution, might give ground of action to a policyholder, it would not necessarily, where there is no allegation of insolvency, give ground for equitable action. *Ib.*

3. *Right of policyholder to participate in surplus.*

As the charter and contract have been construed by the highest court of New York, a policyholder in the Equitable Life Assurance Society can only participate in the surplus of the society according to

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the terms of the policy; and a discretion rests with the officers of the society as to what amount of surplus shall be retained and distributed, and when the distribution shall be made. *Ib.*

*See* ACCOUNTS AND ACCOUNTING; JURISDICTION, E 2; ACTIONS, 1; RECEIVERS, 1, 2; STATES, 1.

## INTERSTATE COMMERCE.

1. *Hepburn Act; commodities clause construed; limitation of application.*

In construing the commodities clause of the Hepburn Act the suggestion of the Government to limit its application to commodities while in the hands of a carrier or its first vendee, and, as thus construed, extend the indirect interest prohibition to commodities belonging to corporations the stock whereof is owned in whole or in part by the carrier, or those which had been mined, manufactured or produced by the carrier prior to the transportation, cannot be accepted. *United States* v. *Delaware & Hudson Co.*, 366.

2. *Hepburn Act; commodities clause; railway not prohibited from moving commodities manufactured, etc., by it.*

The provision contained in the Hepburn Act approved June 29, 1906, c. 3591, 34 Stat. 584, commonly called the commodities clause, does not prohibit a railway company from moving commodities in interstate commerce because the company has manufactured, mined or produced them, or owned them in whole or in part or has had an interest direct or indirect in them, wholly irrespective of the relation or connection of the carrier with the commodities at the time of transportation. *Ib.*

3. *Hepburn Act; commodities clause; what embraced within provision relating to interest of carrier.*

The provision of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of the ownership by the carrier of stock in such corporation provided the corporation has been organized in good faith. *Ib.*

4. *Hepburn Act; commodities clause; object of clause; transportation prohibited.*

Rejecting the construction placed by the Government upon the commodities clause, it is decided that that clause, when all its provisions are harmoniously construed, has solely for its object to prevent carriers engaged in interstate commerce from being associ-

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ated in interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions: (*a*) When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity; (*b*) When the railway company owns the commodity to be transported in whole or in part; (*c*) When the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation. *Ib.*

5. *Hepburn Act; commodities clause; power of Congress to enact; effect to violate due process provision of the Fifth Amendment.*

As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact. *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. The contention that the clause if applied to preëxisting rights will operate to take property of railroad companies and therefore violate the due process provision of the Fifth Amendment, having been based upon the assumption that the clause prohibited and restricted in accordance with the construction which the Government gave that clause is not tenable as to the act as now construed which merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried. *Ib.*

6. *Hepburn Act; commodities clause; power of Congress to except timber; effect of exception on constitutionality of act.*

The constitutional power of Congress to make regulations for interstate commerce is not limited by any requirement that the regulations should apply to all commodities alike, nor does an exception of one commodity from a general regulation of interstate commerce necessarily render a statute unconstitutional as discriminating between carriers; and the exception of timber in the commodities clause of the Hepburn Act does not render the act unconstitutional, nor can

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the question of the expediency of such an exception affect the question of power. *Ib.*

7. *Hepburn Act; commodities clause; character of Delaware & Hudson Company as railroad within purview of clause.*

Although the Delaware and Hudson Company may originally have been chartered principally for mining purposes, as it is now engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, it is a railroad company within the purview of the commodities clause and is subject to the provisions of that clause as they are now construed. *Ib.*

*See* JURISDICTION, A 3;
STATES, 2;
STATUTES, A 4.

INTOXICATING LIQUORS.

*See* LOCAL LAW (S. CAR.).

INVENTION.

*See* PATENTS.

ITALY.

*See* TREATIES, 2, 3.

JEOPARDY.

*See* CONSTITUTIONAL LAW, 2, 6.

JUDGMENTS AND DECREES.

1. *Finality of judgment.*

Where the case goes more than once to the highest court of the State only the last judgment is the final one. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.

2. *Finality of judgment of Circuit Court of Appeals in criminal case.*

The judgment of the Circuit Court of Appeals in a criminal case is final, and is no less so because the appellate jurisdiction of this court might have been invoked directly under § 5 of the act of 1891. *Macfadden* v. *United States*, 288.

*See* APPEAL AND ERROR, 1; JURISDICTION, C 6, 7, 8;
COURTS; PRACTICE AND PROCEDURE, 13, 14;
SALES.

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JUDICIAL DISCRETION.
*See* EVIDENCE, 2;
MANDAMUS, 4.

JUDICIAL LEGISLATION.
*See* INTERSTATE COMMERCE, 1.

JUDICIAL POWERS.
*See* CONSTITUTIONAL LAW, 3;
PRACTICE AND PROCEDURE, 12.

JUDICIAL SALES.
*See* SALES.

JURISDICTION.

A. OF THIS COURT.

1. *Under* § 709, *Rev. Stat. Sufficiency of involution of Federal question.*
To give this court jurisdiction under § 709, Rev. Stat., not only must a right under the Constitution of the United States be specially set up, but it must appear that the right was denied in fact or that the judgment could not have been rendered without denying it. *Western Union Telegraph Co.* v. *Wilson*, 52.

2. *Under* § 709, *Rev. Stat. Sufficiency of involution of Federal question.*
Where the constitutional right was not set up in the original plea, and the record does not disclose the reasons of the state court for refusing to allow a new plea setting up the constitutional right, and the record shows that the refusal might have been sufficiently based on non-Federal grounds, this court cannot review the judgment under § 709, Rev. Stat. *Ib.*

3. *Under* § 709, *Rev. Stat. Sufficiency of involution of Federal question.*
Where it does not appear in the record that a telegraph message between two points in the same State had to be transmitted partly through another State, except by a plea which the state court refused, on non-Federal grounds, to allow to be filed, no Federal question is involved and this court cannot review the judgment under § 709, Rev. Stat. *Ib.*

4. *Under* § 709, *Rev. Stat. What amounts to denial of Federal right.*
Where the opinion of the state court shows that it considered and denied the validity of a statute of another State, and its binding force to control the right of action asserted, a Federal right specially

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set up is denied, and this court has jurisdiction to review the judgment under § 709, Rev. Stat. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.

5. *Under* § 709, *Rev. Stat. What constitutes denial of Federal right.*
Where the state court has found on the facts based on the evidence that the vein of plaintiff in error did not extend under the claim of defendant in error, an expression of opinion that there is a difference between a lode sufficient to validate a location under § 2322, Rev. Stat., and an apex giving extralateral rights (not decided by this court, *Lawson* v. *United States Mining Co.*, 207 U. S. 1) is not necessary to the result, and does not deny a Federal right and this court has not jurisdiction to review the judgment under § 709, Rev. Stat. *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 72.

6. *Under* § 709, *Rev. Stat. Involution of Federal question.*
Where the accused during the trial specifically claims that the action of the state court in denying his plea of once in jeopardy operated to deprive him of his liberty without due process of law contrary to the Fourteenth Amendment, this court has jurisdiction under § 709, Rev. Stat., to review the judgment. *Keerl* v. *Montana*, 135.

7. *To review judgment of state court—Effect of unnecessary decision of Federal question.*
Unless a decision upon the Federal question is necessary to the judgment, or was in fact made the ground of the judgment, this court has no jurisdiction to review the judgment of the state court. *Bonner* v. *Gorman*, 86.

8. *Criminal appeals by Government; scope of review.*
On an appeal taken in a criminal case by the United States under the act of March 2, 1907, c. 2564, 34 Stat. 1246, from the ruling of the Circuit Court sustaining a special plea in bar, this court is limited in its review to that ruling and cannot consider other grounds of demurrer to the indictment. (*United States* v. *Keitel*, 211 U. S. 370, 398.) *United States* v. *Mason*, 115.

9. *Of appeals from Circuit Court of Appeals in bankruptcy proceedings.*
*Coder* v. *Arts*, *post*, p. 223, followed as to the jurisdiction of this court of appeals from the Circuit Court of Appeals in bankruptcy proceedings, where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on writ of error from the highest court of a State to this court. *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 126.

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10. *To review cases certified in which question of jurisdiction alone involved.*

Under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, this court has jurisdiction to review cases certified in which the question of jurisdiction is alone involved and under the power conferred by that statute can reverse the court below, when clearly wrong, even upon questions of fact. *Commercial Mutual Accident Co.* v. *Davis*, 245.

11. *Review of finding of facts made by Supreme Court of Philippine Islands. Section* 10 *of act of July* 1, 1902.

Although there is no technical finding of facts by the court of first instance of the Philippine Islands, if the opinion shows the facts on which the judgment is based and the courts below differ in regard thereto they may be reviewed by this court under § 10 of the act of July 1, 1902, c. 1369, 32 Stat. 691. (*De la Rama* v. *De la Rama*, 201 U. S. 303.) *Strong* v. *Repide*, 419.

*See* APPEAL AND ERROR, 3; CERTIORARI, 3;
BANKRUPTCY, 3, 5; MANDAMUS, 1, 2.

B. OF CIRCUIT COURT OF APPEALS.

*Appellate jurisdiction under* § 6 *of act of* 1891; *effect of right of direct appeal to this court.*

The Circuit Court of Appeals does not lose its jurisdiction of an appeal under § 6 of the act of 1891 because questions were involved which would have warranted a direct appeal to this court under § 5 of that act. *Macfadden* v. *United States*, 288.

*See* APPEAL AND ERROR, 3;
BANKRUPTCY, 3.

C. OF CIRCUIT COURTS.

1. *Rule of court inconsistent with statute, void.*

The jurisdiction of the Circuit Court is fixed by statute, and a rule of court inconsistent with the statute is invalid. *Davidson Marble Co.* v. *Gibson*, 10.

2. *Of action of material-man claiming under act of August* 13, 1894.

As the act of August 13, 1894, c. 280, 28 Stat. 278, does not specify in which Federal court the action of a material-man claiming rights thereunder must be brought, the question of jurisdiction is settled by the general statutory provisions relating thereto; and, under the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, a suit cannot be maintained in a district where the defendants do not reside. *Ib.*



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3. *Special appearance for purpose of objection to—Validity of rule converting special into general appearance.*

A defendant, having a statutory right to appear specially and object to the jurisdiction and the right to appeal to this court if the objection be overruled, cannot be compelled by a rule of court to waive the objection and appear generally; and Rule 22 of the Circuit Court of the United States for the Ninth Circuit requiring a general appearance if the Circuit Court overrule such objection is inconsistent with § 918, Rev. Stat., and therefore invalid. *Ib.*

4. *Effect of Federal question being merely colorable and of omission to decide it, or deciding it against party claiming.*

Where the Federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction, and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the Federal questions or deciding them adversely to the party claiming their benefit. *Siler* v. *Louisville & Nashville R. R. Co.*, 175.

5. *Sufficiency of involution of Federal question.*

Where the bill not only alleges that the statute creating the commission, but also the order of the commission sought to be enjoined, deprives complainant of its property without due process of law, and also violates other provisions of the Constitution, the Circuit Court obtains jurisdiction without reference to the particular violation of the Fourteenth Amendment. *Barney* v. *City of New York*, 190 U. S. 430, distinguished. *Ib.*

6. *To determine removability of cause—Protection of jurisdiction—Interference by state court.*

The United States Circuit Court has jurisdiction to determine for itself the removability of a cause and may take jurisdiction thereof and protect such jurisdiction even though the state court refuse to make the removal order; and a final judgment, rendered by and under such conditions by the Circuit Court, cannot be reviewed by the state court, but such judgment is binding on the state court until reversed by this court. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 207.

7. *Same.*

While a petitioner, if the state court denies his petition for removal, may remain in that court and bring the case here for review on writ of error after final judgment, he is not obliged so to do, but may file the record in the Circuit Court, and that court has jurisdiction

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to determine the question of removability and, notwithstanding § 720, Rev. Stat., it may protect its jurisdiction by injunction against further proceedings in the state court. (*Traction Co.* v. *Mining Co.*, 196 U. S. 239.) *Ib.*

8. *Same.*

A judgment rendered by the Circuit Court under such conditions is not void even if jurisdiction be improperly assumed and retained, as the jurisdictional question can be reviewed by this court, and, until reversed, the judgment is binding on the state court and cannot be treated as a nullity. (*Dowell* v. *Appelgate*, 152 U. S. 327.) *Ib.*

9. *When suit one arising under Constitution and laws of United States. Showing by plaintiff essential.*

A suit only arises under the Constitution and laws of the United States within the meaning of § 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, conferring jurisdiction on the Circuit Court when the plaintiff's statement of his own cause of action shows that it is based on those laws or that Constitution, and it is not enough that defendant may base his defense thereon. (*Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149.) *In re Winn*, 458.

10. *Effect of general appearance as waiver of objection to jurisdiction.*

While a general appearance in the Circuit Court after removal may amount to a waiver of objection to the jurisdiction if some Circuit Court has jurisdiction of the cause, *In re Moore*, 209 U. S. 490, neither appearance nor consent can confer jurisdiction where no Circuit Court has jurisdiction of the controversy. (*Ex parte Wisner*, 203 U. S. 449.) *Ib.*

*See* APPEAL AND ERROR, 3;
REMOVAL OF CAUSES.

D. OF DISTRICT COURTS.

*Citizenship for purposes of—District Court for Porto Rico—Corporation organized under laws of Spain.*

All relations between Spain and Porto Rico having been severed by the cession of that Territory by the Treaty of Paris, a corporation organized under the laws of Spain for purely local and charitable purposes in Porto Rico is not to be regarded as a citizen of Spain within the meaning of the provisions of the act of April 12, 1900, c. 191, 31 Stat. 77, as amended by the act of March 2, 1901, c. 812, 31 Stat. 953, relating to the jurisdiction of the District Court of the

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United States for Porto Rico, nor is such a corporation a citizen of the United States within the meaning of such provision; if it is a citizen of any country it is a citizen of Porto Rico. *Martinez* v. *La Asociacion de Senoras*, 20.

E. OF STATE COURTS.

1. *Over foreign corporations; doing of business within State essential.*

In order for a state court to obtain jurisdiction over a foreign corporation having neither property nor agent within a State it is essential for the corporation to be doing business in the State. *Commercial Mutual Accident Co.* v. *Davis*, 245.

2. *Of suit against foreign corporation—What constitutes doing of business within State for purpose of.*

An insurance company with outstanding policies in a State on which it collects premiums and adjusts losses *held*, in this case, to be doing business within that State, so as to render it liable to an action, and that service, according to the law of the State, on a doctor sent to investigate the loss and having power to adjust the same is sufficient to give the state court jurisdiction. *Ib.*

F. GENERALLY.

1. *Of States and Territories; limitation of jurisdiction.*

No State or Territory can pass laws having force or effect over persons or property beyond its jurisdiction. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.

2. *Effect of statute of Territory where cause of action arises, requiring such actions to be brought in the courts thereof, on jurisdiction of action by other court.*

A court that only permits a recovery on a cause of action on plaintiff's showing compliance with the conditions imposed by a statute of the Territory in which the cause arose has given to that statute the observance required under § 906, Rev. Stat., and if the action is one otherwise controlled by common-law principles its jurisdiction is not defeated because such statute requires actions of that nature to be brought in the courts of the Territory. *Ib.*

3. *Effect of appearance to object to jurisdiction and for removal.*

Where the defendant makes no appearance in the state court or in the Circuit Court except for the purpose of raising the question of jurisdiction and removing the case to the Federal court, such proceed-

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ings do not amount to a general appearance. *Commercial Mutual Accident Co.* v. *Davis*, 245.

*See* ACCOUNTS AND ACCOUNTING; ACTIONS, 2, 3; APPEAL AND ERROR; CONSTITUTIONAL LAW, 3, 4; EQUITY; RATE REGULATION.

JURY AND JURORS.

*See* CONSTITUTIONAL LAW, 6.

KANSAS.

*See* BOUNDARIES.

LAW.

*See* WORDS AND PHRASES.

LAW GOVERNING.

*See* ACTIONS, 2, 3;
LEX LOCI.

LEGISLATIVE POWERS.

*See* CONSTITUTIONAL LAW, 5;
IMMIGRATION;
TERRITORIES, 1, 2, 3.

LEX LOCI.

1. *Determination of character of act as lawful or unlawful.*

While a country may treat some relations between its own citizens as governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done. *American Banana Co.* v. *United Fruit Co.*, 347.

2. *Effect of conspiracy in one country to do acts in another.*

A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law. *Ib.*

*See* ACTIONS, 2.

LICENSE.

*See* PATENTS, 5.

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LIFE INSURANCE.

*See* ACCOUNTS AND ACCOUNTING;
INSURANCE COMPANIES.

LIFE INSURANCE COMPANIES.

*See* RECEIVERS;
INSURANCE COMPANIES.

LIQUORS.

*See* LOCAL LAW (S. CAR.).

LOCAL LAW.

*Arizona.* Rev. Stat. 1887, § 3198. Riparian rights (see Riparian Rights). *Boquillas Cattle Co.* v. *Curtis*, 339.
Howell's Code of 1864, c. 61, § 7, adopting common law (see Riparian Rights, 3). *Ib.*

*District of Columbia.* Code, § 935 (see Appeal and Error, 2). *United States* v. *Evans*, 297.

*Montana.* Penal Code, § 2125. Discharge of jury (see Constitutional Law, 6). *Keerl* v. *Montana*, 135.

*New Mexico.* Actions for personal injuries. Territorial act of March 11, 1903 (see Actions, 3). *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 55.

*Philippine Islands.* Spanish Civil Code, § 1459. Purchase of stock by directors of corporation (see Corporations, 4, 5). *Strong* v. *Repide*, 419. Civil Code, §§ 1261–1269. Avoidance of contract (see Contracts, 4). *Ib.*

*South Carolina. State Liquor Dispensary legislation.* The legal history of the constitutional provisions and legislative enactments of South Carolina in regard to the State Liquor Dispensary, reviewed. *Murray* v. *Wilson Distilling Co.*, 151.

MANDAMUS.

1. *Purpose of writ issued under* § 688, *Rev. Stat.*
A writ of mandamus when issued under § 688, Rev. Stat., is for the purpose of revising and correcting proceedings in a case already instituted in the courts and is part of the appellate jurisdiction of

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this court, which is subject to such regulations as Congress shall make. *In re Winn*, 458.

2. *Writ will lie from this court to compel Circuit Court to remand case to state court.*

Mandamus will lie from this court to compel a Circuit Court to remand a case to the state court where it is apparent from the record that the Circuit Court has no jurisdiction whatever, and the writ will lie even though the party aggrieved may also be entitled to appeal or writ of error. *Ib.*

3. *When appeal or writ of error not adequate remedy for wrongful removal of cause, preventing issuance of mandamus.*

While mandamus never lies where the party praying therefor has another adequate remedy, an appeal or writ of error at the end of a litigation, which must go for naught, is not an adequate remedy for a plaintiff whose case has been wrongfully removed from the state court to the Circuit Court, and held there against his protest. *Ib.*

4. *To control judicial discretion when subject-matter without jurisdiction of court.*

The rule that mandamus will not lie to control the judicial discretion of an inferior court does not apply to an attempt of that court to exercise its discretion on subject-matter not within its jurisdiction. *In re Pollitz*, 206 U. S. 323, and *Ex parte Nebraska*, 209 U. S. 436, distinguished. *Ib.*

MANDATE.

*See* PRACTICE AND PROCEDURE, 13.

MATERIAL-MEN.

*See* JURISDICTION, C 2.
STATUTES, A 11.

MENTAL CAPACITY.

*See* EVIDENCE.

MINES AND MINING.

*See* JURISDICTION, A 5.

MISSOURI.

*See* BOUNDARIES.

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MISTRIAL.

*See* CONSTITUTIONAL LAW, 6.

MOOT CASE.

*See* PRACTICE AND PROCEDURE, 12.

MORTGAGES.

*See* BANKRUPTCY, 2.

MULTIPLICITY OF SUITS.

*See* EQUITY, 4, 5.

MUNICIPAL CORPORATIONS.

*See* EQUITY, 2, 3

NEGLIGENCE.

1. *Proximate cause.*

Although defendant may have been originally in fault, an entirely independent and unrelated cause subsequently intervening, and of itself sufficient to have caused the mischief, may properly be regarded as the proximate cause of plaintiff's injuries. (*Insurance Co.* v. *Tweed*, 7 Wall. 44.) *Atchison, Topeka & Santa Fe Ry. Co.* v. *Calhoun*, 1.

2. *Proximate cause—Railroad accident.*

An unsuccessful attempt to replace a child on a railroad car *held*, in this case, to be the proximate cause of injury to the child notwithstanding such attempt was made as the result of the child's mother having been prevented from getting off the car by the negligence of the railway employés. *Ib.*

3. *Risks to be provided against—Liability of railroad.*

Failure to foresee and provide against extraordinary and unreasonable risks taken by other persons cannot be regarded as negligence, and so *held* that a railroad company was not liable for negligence to one who, in a reckless effort to run after and board a rapidly moving train, stumbled on a truck which had been left by an employé at a place where ordinarily no passenger got on or off the cars. *Ib.*

OPINION EVIDENCE

*See* EVIDENCE.

PARTIES.

*See* ACCOUNTS AND ACCOUNTING;
ACTIONS, 1.

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## PARTNERSHIP.

1. *Effect of adjudication putting two or more persons into bankruptcy as partners to establish existence of partnership.*

While an adjudication putting two or more persons into bankruptcy as partners is, for the purpose of administering the property, good as against all the world, it does not establish the existence of the partnership except as against parties entitled to be heard, and that question is not *res judicata* as against one who had denied being a partner and had not been heard. *Manson* v. *Williams*, 453.

2. *One furnishing capital to business presumed to be partner.*

It will be presumed that one who furnished capital for business expects gain therefrom, and if he is not a creditor receiving interest, his gain must come from profits as a partner. *Ib.*

## PATENTS.

1. *Combination as true mechanical device.*

A combination which produces by the coöperation of its constituents the result specified in the manner specified is a true mechanical device and a valid combination. *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 301.

2. *Combination of process and apparatus.*

A patent may embrace more than one invention, *Steinmetz* v. *Allen*, 192 U. S. 543, and it may embrace a process and the apparatus by which it is performed. *Ib.*

3. *Combination defined—Inclusion of separate claim for new element in same patent as combination.*

While a combination is a union of elements which may be partly new, or wholly old or wholly new, the combination is a means distinct from its constituent elements, any of which, if new and patentable, may be covered by separate claims in the same patent as the combination. *Ib.*

4. *Combination; destruction and reconstruction.*

Where an element of a combination becomes unfit by deterioration there is a destruction of the combination and a renewal of that element amounts to reconstruction. *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 325.

5. *Combination; substitution or resupply of elements.*

The right of substitution or resupply of elements of a combination extends only to repair and replacement made necessary by deteriora-

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tion so as to preserve its fitness; license goes no further and does not extend to furnishing such elements to increase effectiveness or variety of the results of the combination. *Ib.*

6. *Duration—Effect of forfeiture or expiration of foreign patent for same invention.*

A patent of the United States for an invention extends under § 4887, Rev. Stat., for the duration of the definite term for which a foreign patent may have been granted for the same invention, and does not expire by the forfeiture of such foreign patent or through the operation of a condition subsequent according to the foreign patent, such as the payment of fees during the life of the patent. *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 301.

7. *Expiration; effect on domestic of expiration of foreign patent. Identity of invention.*

In this case *held* that the foreign patent granted to Berliner for talking machines was not identical with certain claims included in his United States patent in suit and therefore his patent as to those claims did not expire with the foreign patent under § 4887, Rev. Stat. *Ib.*

8. *Foreign patent; effect on dependent and related inventions.*

Where dependent and related inventions are patented separately a foreign patent for either does not affect the other under § 4887, Rev. Stat., and the same rule applies if such inventions are embraced in one patent. *Ib.*

9. *Infringement—Effect of infringement or invalidity of one of several separate claims in patent.*

Separate claims in the same patent are independent inventions, and the infringement of one is not the infringement of the other, and the redress of the patentee is limited by the injury he suffers; nor is the validity and duration of valid claims affected by the invalidity or expiration of any other claim. *Siemens* v. *Sellers*, 123 U. S. 276, distinguished. *Ib.*

10. *Infringement—Sale of unpatented record discs specially adapted for use on patented talking machine, constituting infringement.*

Unpatented elements of a patented combination may not be sold for use therewith although they may legally be sold for use with other machines, and so *held* that it was infringement to sell record discs specially adapted therefor to the users of a patented talking machine although such discs were not patented and could lawfully be used in combination with other talking machines. *Ib.*

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11. *Infringement; making and supplying unpatented element, necessary for operation of combination, as.*

There is a distinction between the article which a combination machine deals with and the constituent elements composing the combination; and while it may not be infringement to supply the unpatented article dealt with by the combination, it is infringement to make and supply an unpatented element, necessary for the operation of the combination. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, distinguished. *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 325.

12. *Same.*

The combination itself, regardless of whether any or all of the elements be old or new, is the invention and, in law, is as much a unit as a single or non-composite instrument and one using or contributing to its use without permission infringes it. *Ib.*

13. *Same.*

Whether the elements of a combination patent are or are not patented is immaterial. *Ib.*

*See* PRACTICE AND PROCEDURE, 2.

PENAL STATUTES.

*See* STATUTES, A 9.

PENALTIES AND FORFEITURES.

*See* ACTIONS, 4;
VERDICT.

PERSONAL INJURIES.

*See* ACTIONS, 2, 3; NEGLIGENCE; TERRITORIES, 1; TREATIES, 2, 3.

PHILIPPINE ISLANDS.

*See* CONTRACTS, 4;
JURISDICTION, A 11.

PLEADING.

1. *Demurrer, admissions by.*

A demurrer only admits facts well pleaded in the pleading demurred to; it does not admit the pleader's conclusions of law or the correctness of his opinions as to future results. *Equitable Life Assurance Soc.* v. *Brown*, 25.

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2. *Same.*

Where the bill avers solvency of defendant at present, a prediction of insolvency in the future on account of inability to meet claims of policyholders by reason of mismanagement is a mere conclusion of law and not a fact which is admitted by demurrer or on which a court can grant equitable relief. *Ib.*

*See* JURISDICTION, A 2, 8; C 9.

PLEDGE.

*See* BANKRUPTCY, 7.

POLICE POWER.

*See* CONSTITUTIONAL LAW, 10, 11.

PORTO RICO.

1. *Status of—Citizenship and control of local corporations.*

The people of Porto Rico have been created by Congress and exist as a body politic subject only to the usual reserved power of annulment of territorial legislation; and the government of Porto Rico under the organic act is charged with the creation and control of corporations strictly local in character, and corporations of that nature organized prior to the cession of the island are to be regarded for jurisdictional purposes as citizens of Porto Rico. *Martinez* v. *Asociacion de Senoras*, 20.

2. *Treaty of Paris; Article IX construed—Status of corporations.*

While by Article IX of the Treaty of Paris between Spain and the United States provision is made for Spanish subjects, natives of the peninsula, to preserve their allegiance to Spain, that article has no reference to corporations; nor is there any other provision of the treaty providing therefor. *Quære* and not decided, what the citizenship now is of Spanish corporations doing business in Porto Rico prior to its cession by the Treaty of Paris to the United States. *Ib.*

*See* JURISDICTION, D.

POWERS OF CONGRESS.

*See* CONSTITUTIONAL LAW, 5, 10, 11; IMMIGRATION; INTERSTATE COMMERCE, 5; MANDAMUS, 1; PORTO RICO, 1; STATUTES, A 2, 9; TERRITORIES, 3.

PRACTICE AND PROCEDURE.

1. *Acceptance of finding of lower courts.*

In the absence of a clear showing of its incorrectness this court accepts

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the finding of the lower courts. *Sand Filtration Corporation* v. *Cowardin*, 360.

2. *Following lower court's findings of fact.*

Where grave questions of fact are presented by the proof on which a preliminary injunction has been granted in a patent case, this court will not go beyond the action of the lower court and decide those questions and the case on the merits. *Leeds & Catlin* v. *Victor Talking Mach. Co.*, 301.

3. *Following findings of fact concurred in by lower courts.*

Where both the District Court and Circuit Court of Appeals have found as a fact that a partnership existed and owned the stock, while this court may, it will not, as a general rule, disturb the findings. *Manson* v. *Williams*, 453.

4. *Following finding of fact concurred in by lower courts.*

In this case, there being evidence to support the finding of the two lower courts that a partnership existed by an implied understanding between two brothers pending the formation of a corporation, this court affirms the judgment notwithstanding that it might not necessarily have reached the same conclusion had the case been here tried in the first instance. *Ib.*

5. *Following state court's construction of state statute.*

The construction of a state statute by the highest court of the State must be accepted by this court even though similar statutes of other States have been differently construed by the highest courts of those States. *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 268.

6. *Findings of fact by state court, when not conclusive; reconsideration by this court; scope of consideration.*

In reviewing the judgment of a state court under § 709, Rev. Stat., findings of fact resting on a false definition of a right existing under a Federal statute cannot be assumed to be correct and may be reconsidered; but the evidence will not be discussed here, and this court considers only whether there has been a mistake of law. *Mammoth Mining Co.* v. *Grand Central Mining Co.*, 72.

7. *Ground for reversal where findings of fact by trial court reëstablished by highest court of State on appeal.*

Where the trial court merely called in an advisory jury and in the highest court of the State on appeal the evidence was discussed and the findings reëstablished, reversal by this court can only be based on errors, if any, in opinion of the highest court. *Ib.*

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8. *Effect of state court's construction of state statutes.*
Even though state legislation and decisions as to the construction of state statutes may not be controlling upon this court, yet they may be persuasive. *Murray* v. *Wilson Distilling Co.*, 151.

9. *Constitutional questions not decided if case can be otherwise disposed of.*
The rule of this court is not to decide constitutional questions if the case can be decided without doing so; and when, as in this case, it can dispose of the case by construction of the statute and on the lack of authority given by such statute to make the order complained of, it will do so rather than on the constitutional questions involved. *Siler* v. *Louisville & Nashville R. R. Co.*, 175.

10. *Construction by this court of state statute not construed by state court.*
Notwithstanding the highest court of the State has not yet construed the statute involved, this court must, in a case of which it has jurisdiction, construe it. *Ib.*

11. *Presumptions avoided where nothing in record on which to base them.*
Where there is nothing in the record on which to base them this court cannot indulge in presumptions as to which of several possible forms a transaction may have taken. *Selliger* v. *Kentucky*, 200.

12. *Dismissal of appeal where case has become a moot one.*
When the judgment appealed from cannot be affected by the decision of the appellate court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal for the purpose of establishing a rule of observance in cases subsequently arising is not an exercise of judicial power. *United States* v *Evans*, 297.

13. *Mandate on reversal; when character of decree to be entered below not directed.*
As the construction now given the act differs widely from the construction which the Government gave to the act and which it was the purpose of these suits to enforce, it is not necessary in reversing and remanding, to direct the character of decrees which shall be entered, but simply to reverse and remand the case with directions to enforce and apply the statute as it is now construed. *United States* v. *Delaware & Hudson Co.*, 366.

14. *Affirmance of judgment objectionable in form.*
Although there may be objections to the form of judgment in the Court of First Instance as they are not of a material nature this court will follow the same course. *Strong* v. *Repide*, 419.

*See* BANKRUPTCY, 6; PROCESS;
JURISDICTION, A 8; STATUTES, A 5, 10.

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PREFERENCES.

*See* BANKRUPTCY, 1, 2.

PRESUMPTIONS.

*See* EQUITY, 2;
PARTNERSHIP, 2;
PRACTICE AND PROCEDURE, 11.

PROCESS.

*Fraud in obtension of service as ground for setting aside.*

While service of process on one induced by artifice or fraud to come within the jurisdiction of the court will be set aside, this court will not reverse the finding of the trial court that there was no such fraud where, as in this case, there is testimony supporting it. *Commercial Mutual Accident Co.* v. *Davis*, 245.

*See* JURISDICTION, E 2;
STATES, 1.

PROSTITUTES.

*See* CONSTITUTIONAL LAW, 11.

PROXIMATE CAUSE.

*See* NEGLIGENCE, 1, 2.

PUBLIC OFFICERS.

*See* SOVEREIGNTY, 2.

PUBLIC SERVICE CORPORATIONS.

*See* EQUITY, 2, 3.

PUBLIC WORKS.

*See* JURISDICTION, C 2;
STATUTES, A 11.

RAILROADS.

*See* INTERSTATE COMMERCE; RATE REGULATION;
NEGLIGENCE, 2, 3; STATUTES, A 4.

RATE REGULATION.

1. *Jurisdiction of state railroad commission to make general maximum rates for all commodities not to be implied.*

Jurisdiction so extensive as to place in the hands of a commission power

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to make general maximum rates for all commodities between all points in the State is not to be implied, but must be given in language admitting no other reasonable construction, and this power cannot be found in the Kentucky Railroad Commission Act. *Siler* v. *Louisville & Nashville R. R. Co.*, 175.

2. *Power of state railroad commission to fix maximum rates on all commodities.*

The fact that the legislature of a State gives to a railroad commission no power to raise rates, but only power to reduce rates found to be exorbitant after hearing on specific complaint, is an argument against construing the statute so as to give the commission power to fix maximum rates on all commodities. *Ib.*

3. *Effect on entire tariff of illegal fixing of general rate tariff for maximum rates on all commodities.*

Where a railroad commission after a hearing on specific complaint as to a rate on a particular commodity makes a general rate tariff for maximum rates on all commodities which is beyond its statutory power, the whole tariff falls, and the rate on the tariff on the particular commodity will not be separately sustained. *Ib.*

4. *Same.*

The Kentucky railroad commission having, after a hearing on complaints that the rates on lumber were too high, attempted to impose a general maximum intrastate tariff schedule, and the statute creating the commission not giving it authority to make such a schedule, this court, without deciding whether either the statute or the order deprives the railroad companies of their property without due process of law, holds that the entire schedule of rates including those on lumber must fall as being beyond the jurisdiction of the commission to establish in that manner. *Ib.*

## RECEIVERS.

1. *Appointment for life insurance company; considerations entering into.*

A life insurance company which has several hundred thousand policyholders is in its nature a public institution, and where there is no apprehension as to its solvency, a court of equity will consider all the facts as to the relative advantages and disadvantages of a receivership or accounting before granting relief of that nature in the suit of an individual policyholder even if jurisdiction to grant such relief exists. *Equitable Life Assurance Soc.* v. *Brown*, 25.

2. *Ground for appointment of receiver for life insurance company.*

The fact that stockholders claim the surplus of an insurance company

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and the officers of the company do not actively deny the claim gives no ground for a receivership at the suit of a policyholder claiming that the surplus belongs to the policyholders. *Ib.*

REMEDIES.

*See* APPEAL AND ERROR; EQUITY, 1; CERTIORARI; INJUNCTION; MANDAMUS.

REMOVAL OF CAUSES.

1. *Appearance of Federal question in plaintiff's case essential to removal to Federal court.*

Although a defendant in the state court may set up a defense based on Federal rights which will, if denied, entitle him ultimately to have the decision reviewed by this court, if the Federal question does not appear in the plaintiff's statement the case is not removable to the Circuit Court of the United States. *In re Winn*, 458.

2. *Original jurisdiction as prerequisite to removal.*

No cause can be removed from the state court to the Circuit Court of the United States unless it could have originally been brought in the latter court. (*Boston Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, and *Ex parte Wisner*, 203 U. S. 449.) *Ib.*

*See* APPEAL AND ERROR, 1; JURISDICTION, C 6, 7, 10; F 3; MANDAMUS, 2, 3.

RESCISSION OF CONTRACT.

*See* CONTRACTS, 4; CORPORATIONS, 3, 5.

RESERVED POWERS.

*See* CONSTITUTIONAL LAW, 10, 11.

RES JUDICATA.

*See* PARTNERSHIP, 1.

RIPARIAN RIGHTS.

1. *Arizona law relating to.*

Under § 3198, Rev. Stat. of Arizona of 1887, the common-law doctrine of riparian rights does not now obtain in that Territory, and, as held by the Supreme Court of the Territory, the doctrine of appropriation was recognized and to some extent in force prior to and since



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1833 in the State of Sonora now a part of that Territory. *Boquillas Cattle Co.* v. *Curtis*, 339.

2. *Confirmation of estate in Arizona, by United States; effect to give riparian rights not included in original Mexican title.*

Confirmation of an estate does not enlarge it, and where the original Mexican title did not carry riparian rights the mere confirmation thereof by the United States does not give such rights to the confirmee. *Ib.*

3. *Arizona; effect of adoption of common law.*

The legislative act of Arizona, Howell's Code of 1864, c. 61, § 7, adopting the common law of England was merely the adoption of a general system of law in place of the Spanish Mexican general system which was simultaneously repealed, and the regulation of and rights to water were by the same act made subject to the natural and physical condition of the Territory and the necessities of its people; and this court sustains the Supreme Court of the Territory in its interpretations of the qualifications imposed on the general adoption of the common law in respect to the use of water. *Ib.*

4. *Arizona—Right to use water not confined to riparian proprietors.*

The right to use water is not confined under the customary law of Arizona to the riparian proprietors. Where the riparian proprietor is entitled under a general statute to have the damages to his land taken for withdrawal of water by appropriators assessed, the decree below will not be disturbed because no provision was made for compensation, it appearing in this case that the objection was technical and the point was not discussed below. *Ib.*

RULES OF COURT.

*See* JURISDICTION, C 1, 3.

SALES.

*Judicial; setting aside.*

However vexatious the conduct of a litigant may be his property should not be sacrificed by reason of the court's action; and it appearing, in this case, that the existence of an order in regard to a sale of property under execution made the sale disastrous, it was proper, whether the order was valid or not, to set the sale aside and order a reconveyance on payment into court of the amount of the judgment. *Van Gieson* v. *Maile*, 338.

*See* CORPORATIONS, 3, 4, 5;
PATENTS, 10;
VENDOR AND VENDEE.

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SECOND JEOPARDY.
*See* CONSTITUTIONAL LAW, 2, 6.

SELF-INCRIMINATION.
*See* ACTIONS, 4.

SERVICE OF PROCESS.
*See* JURISDICTION, E 2;
PROCESS;
STATES, 1.

SHERMAN ACT.
*See* ANTI-TRUST LAW.

SOVEREIGNTY.

1. *Definition.*

Sovereignty means that the decree of the sovereign makes law; and foreign courts cannot condemn the influences persuading the sovereign to make the decree. *Rafael* v. *Verelst*, 2 Wm. Bl. 983, 1055, distinguished. *American Banana Co.* v. *United Fruit Co.*, 347.

2. *Acts of soldiers and officials as acts of Government.*

Acts of soldiers and officials of a foreign government must be taken to have been done by its order. *Ib.*

*See* LEX LOCI.

SPAIN.
*See* JURISDICTION, D;
PORTO RICO, 2.

SPECIAL APPEARANCE.
*See* JURISDICTION, C 3; F 3.

SPECIFIC PERFORMANCE.
*See* CONSTITUTIONAL LAW, 4.

STATES.

1. *Regulation of foreign corporations; service of process.*

A State may require a foreign insurance corporation not having any regular office in the State to make its agents who have authority to settle losses in the State competent to receive notice of actions

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concerning such losses. *Commercial Mutual Accident Co.* v. *Davis*, 245.

2. *Power to regulate delivery of messages after interstate transit completed.*
In the absence of action on the part of Congress a State may regulate the conduct of local delivery of telegraph messages after the interstate transit by wire is completed. *Western Union Telegraph Co.* v. *Wilson*, 52.

*See* BOUNDARIES; CONSTITUTIONAL LAW, 2, 3, 4, 7, 8, 9, 10, 11; IMMIGRATION; INJUNCTION, 2; JURISDICTION, F 1; E.

## STATUTES.

### A. CONSTRUCTION OF.

1. *Criterion of constitutionality.*
In the construction of a statute the power of the lawmaking body to enact it, and not the consequences resulting from the enactment is the criterion of constitutionality. *United States* v. *Delaware & Hudson Co.*, 366.

2. *Avoidance of grave constitutional questions.*
A prohibition in an act of Congress will not be extended to include a subject where the extension raises grave constitutional questions as to the power of Congress, where one branch of that body rejected an amendment specifically including such subject within the prohibition. *Ib.*

3. *Constitutionality maintained if possible—Avoidance of grave and doubtful constitutional questions.*
The duty of this court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality (*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197) includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions. (*Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.) *Ib.*

4. *Same. Rule applied to commodities clause of Hepburn Act.*
This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation. *Ib.*

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5. *Separable provisions; when constitutionality of separable provision not considered.*

Where, as in this instance, the provision for penalties is separable from the provisions for regulations, the court will not consider the question of the constitutionality of the penalty provisions in a suit brought by the Government to enjoin carriers from violating the regulations and in which no penalties are sought to be recovered. *Ib.*

6. *Ambiguity resolved—Restraint of provisions for purposes of accord.*

Where ambiguity exists it is the duty of a court construing a statute to restrain the wider and doubtful provisions so as to make them accord with the narrow and more reasonable provisions and thus harmonize the statute. *Ib.*

7. *Limitation of operation and effect.*

A statute will, as a general rule, be construed as intended to be confined in its operation and effect to the territorial limits within the jurisdiction of the lawmaker, and words of universal scope will be construed as meaning only those subject to the legislation. *American Banana Co.* v. *United Fruit Co.*, 347.

8. *Of state statute; strained implication avoided.*

A state statute will not, by strained implication, be construed as a divestiture of rights of property, or as authorizing administration of the assets of a governmental agency, without the presence of the State, and so *held* as to the statute of South Carolina providing for winding up the State Liquor Dispensary. *Murray* v. *Wilson Distilling Co.*, 151.

9. *Penal statutes without the power of Congress to enact cannot be sustained by the courts.*

Notwithstanding the offensiveness of the crime the courts cannot sustain a Federal penal statute if the power to punish the same has not been delegated to Congress by the Constitution. *Keller* v. *United States*, 138.

10. *Of charter granted under general act—Effect on Federal courts of state court's construction.*

The construction of a general act and a charter granted thereunder pertain to the state court just as if the charter were granted by a special act; and in a suit by the holder of a policy, executed at the home office, the meaning and construction of the charter as held by the state court will be binding on the Federal courts, and, in the absence of any Federal question, the construction of the contract

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by the state court will be of most persuasive influence even if not of binding force. *Equitable Life Assurance Soc.* v. *Brown*, 25.

11. *Prospective effect of act of February* 24, 1905, *c.* 280.
*U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, followed to effect that the act of February 24, 1905, c. 778, 33 Stat. 811, amending the act of August 13, 1894, c. 280, 28 Stat. 278, is prospective and does not control actions based on rights of material-men already accrued, but that such actions are controlled by the act of 1894. *Davidson Marble Co.* v. *Gibson*, 10.

12. *Limitation of operation amounting to judicial legislation.*
Although a limitation to its operation might be reasonable and thus assuage the radical results of a prohibitory statute, if it is not expressed in the statute, to engraft such a limitation would be pure judicial legislation. *United States* v. *Delaware & Hudson Co.*, 366.

*See* BOUNDARIES, 2;
CERTIORARI, 2;
INTERSTATE COMMERCE, 1, 4;
PRACTICE AND PROCEDURE, 5, 8, 10;
RATE REGULATION, 2.

B. STATUTES OF THE UNITED STATES.

*See* ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

*See* LOCAL LAW.

STOCK AND STOCKHOLDERS.

*See* ACTIONS, 1;
CORPORATIONS;
RECEIVERS, 2.

SUITS AGAINST STATES.

*See* CONSTITUTIONAL LAW, 3, 4, 7, 8.

SURETIES.

*See* JURISDICTION, C 2;
STATUTES, A 11.

TAXES AND TAXATION.

*Tax on warehouse receipt as tax on goods represented.*
A tax upon warehouse receipts for goods amounts in substance and effect to a tax upon the goods themselves. (*Fairbanks* v. *United States*, 181 U. S. 283.) *Selliger* v. *Kentucky*, 200.

*See* CONSTITUTIONAL LAW, 8, 9;
INJUNCTION, 1, 2, 3.

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## TELEGRAMS.

*See* JURISDICTION, A 3;
STATES, 2.

## TERRITORIES.

1. *Legislative power concerning personal injuries and rights of action.*

Where Congress confers on a Territory legislative power extending to all rightful subjects of legislation the Territory has authority to legislate concerning personal injuries and rights of action relating thereto; and so held in regard to the legislative power of New Mexico under act of Sept. 9, 1850, c. 49, 9 Stat. 446. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*. 55.

2. *Legislative act an exercise of authority under United States.*

The passage of a legislative act of a Territory is the exercise of authority under the United States. (*McLean* v. *Railroad Co.*, 203 U. S. 38, 47.) *Ib.*

3. *Legislative powers—Revisory power of Congress.*

Congress has only reserved a revisory power over territorial legislation, and a statute duly enacted, and within the legislative power of the Territory, remains in full force until Congress annuls it by exerting such power. (*Miner's Bank* v. *Iowa*, 12 How. 1, 8.) *Ib.*

*See* CONSTITUTIONAL LAW, 5; PORTO RICO, 1;
JURISDICTION, F 1; RIPARIAN RIGHTS.

## TITLE.

*See* BOUNDARIES, 3;
RIPARIAN RIGHTS, 2.

## TREATIES.

1. *Force and effect of treaty with foreign government.*

A treaty between the United States and a foreign government within the constitutional limits of the treaty-making power is, by the express words of the Constitution, the supreme law of the land binding alike on national and state courts and must be enforced by them in the litigation of private rights. *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 268.

2. *Treaty with Italy of* 1871; *giving of actions for injury and death not within contemplation of.*

While undoubtedly the giving of actions for injury and death results in care and security against accidents to travelers the protection and security thus afforded are too remote to be considered as ele-

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ments in contemplation of the contracting powers to the treaty of 1871 between Italy and the United States. *Ib.*

3. *Same.*

By a fair construction, Articles 2, 3 and 23 of the treaty with Italy of 1871, 17 Stat. 845, do not confer upon the non-resident alien relatives of a citizen of Italy a right of action for damages for his death in one of the States of this Union although such an action is afforded by a statute of that State to native resident relatives, and although the existence of such an action might indirectly promote his safety; and so *held* as to the statute of Pennsylvania, it having been so construed by the highest court of that State. *Ib.*

*See* PORTO RICO, 2.

TRUSTEE IN BANKRUPTCY.

*See* BANKRUPTCY, 7.

TRUSTS AND TRUSTEES.

*See* INSURANCE COMPANIES, 1.

UNITED STATES.

*See* APPEAL AND ERROR, 2;
CERTIORARI, 2;
VERDICT.

VENDOR AND VENDEE.

1. *Fraud of vendor invalidating sale made through agent.*

Where a sale made through an agent of the vendor has been effected by the fraud and deceit of the vendor, the sale cannot stand whether or not the vendor's agent had power to sell. *Strong* v. *Repide*, 419.

2. *Fraud to avoid sale—Method of payment as evidence of fraudulent intent and scheme.*

While the method of payment cannot have induced the vendor's consent to a sale, where that method tended to conceal the identity of the purchaser and was part of a scheme to conceal facts, the knowledge of which would have resulted in vendor's refusal to sell, evidence as to the payment is admissible to show the fraudulent intent and scheme of the purchaser. *Ib.*

*See* CORPORATIONS, 1–5.

VERDICT.

*Direction of verdict for Government in action to recover penalty prescribed by Alien Immigration Act of* 1903.

A suit brought by the United States to recover the penalty prescribed

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by §§ 4 and 5 of the Alien Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, is a civil suit and not a criminal prosecution, and when it appears by undisputed testimony that a defendant has committed an offense against those sections the trial judge may direct a verdict in favor of the Government. *Hepner* v. *United States*, 103.

WAIVER.

*See* APPEAL and ERROR, 4;
JURISDICTION, C 10.

WAREHOUSE RECEIPTS.

*See* CONSTITUTIONAL LAW, 9;
TAXES AND TAXATION.

WATER BOUNDARIES.

*See* BOUNDARIES.

WATERS.

*See* RIPARIAN RIGHTS.

WILL CONTESTS.

*See* EVIDENCE.

WITNESSES.

*See* EVIDENCE.

WORDS AND PHRASES.

*Law defined.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts; but the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. *American Banana Co.* v. *United Fruit Co.*, 347.

WRIT AND PROCESS.

*See* APPEAL AND ERROR; JURISDICTION;
CERTIORARI; MANDAMUS;
INJUNCTION; PROCESS.

WRIT OF ERROR.

*See* APPEAL AND ERROR;
JURISDICTION.

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